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RACE HORSES
See Animal Life and Feed.

RAIL FREIGHT CARS, EXEMPTION OF
See Interstate and Foreign Commerce.

445.0000 RATE OF TAX—CHANGE IN
See also "Tax-Paid Purchases Resold".

445.0010 **Coin Operated Copy Machine.** A taxpayer sells photocopies through coin operated machines. It contracts with owners of stores, libraries, and other locations to install the machines in places accessible to the public. The contracts typically provide that the taxpayer will pay the location owners a percentage of the receipts from the machines. There is no contract between the taxpayer and the location owner regarding the per copy price. The per copy price is initially set by the taxpayer at a per copy price it deems appropriate. However, contracts do include a provision allowing price changes. Contracts include the following paragraph:

> "Vendor (taxpayer) reserves the right to reasonably raise or lower the vend price for coin copies . . . . in accordance with prevailing economic conditions."

The taxpayer did not raise the per copy price even though there was a tax increase. Price increases in vending machines are made in at least one nickel increments, since machines requiring payment in odd penny amounts are not practical.

In this case, the taxpayer's contracts do not qualify for the fixed price exemptions under Revenue and Taxation Code sections 7261 and 6376.1. The contracts may have obligated the taxpayer to pay a fixed percentage to the location owners as rent, but they did not obligate the claimant to furnish the copies for a fixed price as required by the statute. The typical contract authorized the taxpayer to raise prices in accordance with "prevailing economic conditions," and a tax increase would justify a price rise under this language. The fact that the taxpayer was unwilling to raise prices because one penny increases would be impractical and a nickel decision increase would deter the customer was purely a business decision and was not required by the contracts. 3/2/94.

445.0020 **Delivery After Change.** Prior to August 1, 1967, a nursery executed a contract under which it agreed to sell berry plants to a customer and to deliver the plants after August 1, 1967. The customer paid a deposit prior to that date and the berry plants were delivered to him after August 1, 1967. Inasmuch as it was not explicitly agreed otherwise, title passed to the buyer at the time the seller completed his performance with reference to the physical delivery of the goods. Accordingly, the applicable tax rate was that which was in effect after August 1, 1967. 9/20/67.

RATE OF TAX, ETC. (Contd.)

445.0060 **Withholding Sales Tax from Gasoline Tax Refunds.** The sales tax rate applicable where sales tax is withheld by the controller from a motor vehicle fuel license tax refund is the rate in effect at the time the application for refund is processed by the State Controller. This is because the sale of fuel is exempt from sales tax pursuant to Section 6357 of the Sales and Use Tax Law at the time of the sale. No sales tax is imposed unless and until the license tax becomes subject to refund.

However, when fuel is sold to a foreign consulate officer or employee who is exempt from the motor vehicle fuel license tax by treaty, the sales tax applies at the time of the sale and the applicable tax rate is, therefore, the rate in effect at that time. 9/6/67.

REAL PROPERTY
See Buildings and Other Property Affixed to Realty; Construction Contractors; United States Contractors.

RECAPPING TIRES
See Retreading and Recapping Tires.

RECEIPTS
See Gross Receipts.

450.0000 RECEIPTS FOR TAX PAID TO RETAILERS—Regulation 1686

450.1000 **Requirements for Tax Collected from Lessees.** For rental transactions with respect to which use tax applies, an invoice showing the data required in Regulation 1686, together with evidence of payment of such invoice, will constitute a receipt. The use tax listed on the invoice must be the exact amount collected.

If a lessee pays by check, the canceled check would be regarded as sufficient evidence of payment. If, however, the lessee pays in cash, the lessor would have to provide the lessee evidence of payment, that is a receipt. The receipt would not have to separately state the tax since that information is set forth in the invoice (lease agreement). 10/3/88.

RECEIVERS AND TRUSTEES IN BANKRUPTCY, EXECUTORS AND ADMINISTRATORS, SHERIFFS, COMMISSIONERS, AND OTHER COURT-APPOINTED OFFICERS
See Court Ordered Sales, Foreclosures and Repossessions.

RECONDITIONERS
See Installing, Repairing and Reconditioning in General; Miscellaneous Repair Operations.

RECORDING STUDIOS
See Sound Recording.

455.0000 RECORDS—Regulation 1698
Confidentiality of, see also Confidential Information. Government, furnished copies of, see also Service Enterprises Generally.

455.0015 **Acceptability of Facsimile (FAX) Documents.** The problem that arises when considering the acceptability of faxed documents is that while the Evidence Code states: ''A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail'' there is no comparable presumption for fax transmissions. With respect to the filing of an application for a seller's permit, there is no specific authorization for the Board to accept faxed filings. If one is received, it becomes business records and must be authenticated by the party signing the application.

Notarized documents cannot be accepted via fax transmission because a notary is required by Government Code section 8207 to ''authenticate with the official seal all notarial acts,'' and a faxed copy is not under the notary's official seal. 8/18/92.

455.0100 **Cash Register.** Use of a cash register by a taxpayer is not absolutely required if cash registers are not ordinarily maintained by the average prudent business person engaged in the activity in question. The taxpayer must nevertheless devise a bookkeeping system sufficient to show sales and purchases. 5/24/94.

455.0300 **Gasoline Suppliers Account Number.** The listing of a gasoline supplier's ''SG'' account number is not mandatory on the dealer's return on which a claim for credit on prepaid tax is made by the dealer. However, if the retailer does not have the sufficient documentation to support the credits it claims and the Board cannot verify them, the retailer's claim for credit would be denied. 5/24/94.

455.0750 **Records to Show Rented Property is Tax-Paid.** Although Sales and Use Tax Regulation 1698 authorizes the destruction of records after four years, that does not apply to records needed to show that rented property was purchased tax-paid. It is the taxpayer's burden to show that tax does not apply to current rental receipts. 2/25/75.

455.0770 **Reliance on Board Advice.** Section 6596 has application only to situations in which a person has reasonably relied on written advice from the Board sent in response to a written request as described in section 6596(b)(1) and, based on such reliance, has failed to obtain reimbursement for the expense of the sales or use tax. It does not apply to relief from penalties or interest except as those charges relate to tax being canceled or refunded under the conditions expressed in the section. (Relief from penalty and interest under other conditions may be obtained under section 6592.) Additionally, section 6596 applies only to

RECORDS (Contd.)

the taxability of a fully described activity or transaction. It does not provide the Board equity powers over issues such as the measure of tax, tax rate, calculation errors, and audit procedures. 8/14/89.

455.0785 **Right to Subpoena Audit Records.** A taxpayer has refused to make its books and records available for audit unless the auditor allowed the taxpayer to videotape all audit work discussions.

As a policy matter, Board auditors do not request subpoena for books and records unless there has been a refusal on the part of the taxpayer to cooperate with the audit staff. In this case, the taxpayer appears to be placing conditions or limitations on the right of the Board and its audit staff to perform its statutorily mandated function. There is no provision of law which would allow a taxpayer to videotape any audit discussion or which would allow a taxpayer to condition cooperation in an audit on the ability to videotape the discussion. As long as the taxpayer continues to insist on the right to videotaping as a precondition to the availability of its books and records, the taxpayer has in effect refused to cooperate with the audit staff and has not made its records available as required by law.

Government Code section 15613 does not require, as a precondition to the issuance of a subpoena, that the taxpayer refuses to provide its books and records to the Board. As such, the Executive Director could issue a subpoena requesting the books and records of any taxpayer whether or not the taxpayer has placed conditions on the availability of the books and records. 9/29/92.

455.0800 **Reliance on Written Advice.** Only the person making a written request for an opinion may rely upon that opinion to qualify for relief of back taxes, interest and penalties. 7/3/91.

455.0835 **Subsequent Rental After Personal Use.** A lessor leased equipment not in substantially the same form as acquired and paid use tax on its rental charges. After rental of the property, the lessor made personal use of the equipment. It was advised in a letter from the Board that the equipment would be subject to use tax measured by the cost of the equipment with credit allowed for tax previously paid for the rental of the equipment. The Board's letter did not state whether or not a subsequent lease of the equipment would be taxable. The lessor concluded that since the tax paid on the rental of the equipment far exceeded the use tax due on the cost of the equipment, it was not required to charge additional tax when the equipment was first rented to a customer after it made personal use of the equipment.

While Regulation 1660 provides that a credit for prior payment sales or use tax can be applied against tax due, the regulation also states that use tax is due on subsequent rental charges. (Regulation 1660(c)(6).)

Also, with respect to erroneous information, the lessor did not rely on what the Board stated in its response, but, rather, what the Board did not state in its response. Section 6596 requires reliance on erroneous advice from the Board, not what the Board failed to state. Therefore, taxpayer cannot be granted relief from tax liability under section 6596. 3/14/95.

RECORDS (Contd.)

455.0900 **Unavailable Records.** When records have been destroyed or are otherwise unavailable, the auditor is entitled to make a reasonable estimate as to the amount of taxable sales made. It is then the burden of the taxpayer to show that the estimate of the auditor is incorrect and also to provide information as to the correct amount of tax.

The application of the penalty for fraud may be based on a combination of acts or omissions by the taxpayer such as unreasonably delaying the start of an audit, failing to provide records which are required to be kept, and reporting tax significantly lower than the tax found to be due. 2/1/94.

455.1000 **Written Notice of Board Action.** Sending a notice of Board action to the taxpayer using the address appearing in the Board's records is full compliance with Section 6486 . The only requirement is that the notice be written, placed in a sealed envelope, with postage, and addressed to the retailer at the address in the Board's records. When a taxpayer provides the Board with its chosen d.b.a., the Board may use the d.b.a. when corresponding with the taxpayer concerning the business of that d.b.a. 1/7/93.

REDETERMINATIONS
See Remedies of Taxpayers.

REFINISHING
See Repainting and Refinishing.

REFUNDS
See Remedies of Taxpayers.

460.0000 REIMBURSEMENT FOR SALES TAX—Regulation 1700
"Pre-Need" agreements of morticians, cemetery associations, etc., effect of showing reimbursement in, see also Morticians

460.0005 **Advertisement Stating No Sales Tax.** A retailer is prohibited from advertising that use tax does not apply to a transaction for which the retailer is required to collect use tax. There is no such prohibition with respect to sales tax. However, unless the retailer clearly states that sales tax is included, the retailer cannot report sales on a tax included basis and thus claim a deduction for sales tax reimbursement. 12/15/93.

460.0010 **Billing Pursuant to Medical Assistant Program (Medical).** Pursuant to medical regulations (section 51520 of Title 22, Chapter 2, California Code of Regulations), payment for medical supplies include an amount for sales tax reimbursement. When the retailer codes his invoice to alert Medical that the price billed includes sales tax reimbursement, he notifies Medi-Cal that payment will include an amount for sales tax pursuant to the medical regulations. This is sufficient notice to establish the presumption that the property is sold at a price which includes tax reimbursement pursuant to Regulation 1700. Accordingly, amounts billed for such sales should be considered tax included. 10/5/88.

REIMBURSEMENT, ETC. (Contd.)

460.0012 **Body Shop Repair Supplies.** A body shop and repair operator has charged its customers a flat fee for supplies ''rated'' to the job. Usually such fees relate more to the operator's own formula than to the actual value of the supplies used. The operator uses this approach in an attempt to avoid paying the sales tax to the sellers of the supplies. The supplies are items such as sandpaper, paint thinner, etc.

If a purchaser who has a valid seller's permit insists on its purchasing for resale property of a kind not normally resold in its business and makes such a statement on the resale certificate, the retailer would have no alternative but to accept the retail certificate as taken in good faith and the seller would then be exempt from the imposition of sales tax. The purchaser who gave the certificate would be liable for the use tax if in fact it used the items rather than resold them.

Items purchased and used by the body shops such as masking tape, thinner and the like are not regarded by the Board as items sold by the repairer and, accordingly, the repair shop should not charge tax to its customers. As a consumer of such materials, the body shop is guilty of a misdemeanor under the sales and use tax law when ''tax'' or ''tax reimbursement'' is charged to the customers. Such charges will be regarded as excess tax reimbursement and will have to be refunded to the customers or they will be retained by the Board.

In addition, the purchaser (body shop) will still be liable for use tax measured by the purchase price of those items purchased from the supplier under a resale certificate and used on the job. In such cases, the shop operator would be responsible for the payment of the use tax directly to the Board without any offset for the amount of tax reimbursement that was collected from the customers.

Also, if a particular individual continues to collect excess tax reimbursement, the Board has the authority to revoke his seller's permit. 5/26/77.

(Note subsequent statutory change re excess tax reimbursement)

460.0016 **Charge Customers for Obtaining Refund.** In an audit of the taxpayer, the staff determined that the taxpayer was leasing equipment and selling materials in connection with its ''special'' process. The taxpayer appealed the audit determination. While the appeal was in process, the taxpayer collected sales and use tax on its ''special'' process receipts. Thereafter, the Board reversed the staff's position and determined that the ''special'' process was a nontaxable service. The taxpayer and its customers then entered into an agreement in which the taxpayer would file a claim for refund on behalf of the customers.

In this case, there was excess sales tax reimbursement and use tax collected from the customer. In the case of excess reimbursement of sales tax, the taxpayer must refund the excess tax reimbursement in full to the customer from whom an excess amount was collected. The customer's right to receive a refund of excess tax reimbursement collected cannot be contingent upon the customer's reimbursement of the taxpayer's expenses.

In the case of the overpayment of use tax by a customer to a retailer who is required to collect the tax, each customer may directly file a claim for refund with

REIMBURSEMENT, ETC. (Contd.)

the Board for the overpayment of the use tax. Alternatively, each customer has the discretion to hire a representative to file a claim for refund on its behalf.

Based on the agreement between the taxpayer and the customer, the customer knowingly and willingly entered into the agreement for its convenience. Therefore, the taxpayer may charge for services rendered in filing a claim for refund on behalf of its customers for the overpayment of use tax, but may not do so with respect to the excess sales tax reimbursement. 1/12/96.

460.0020 **Collection Not Mandatory.** Retailer is not compelled to make an attempt to collect reimbursement for the sales tax from the vendee on all retail sales. The courts have held that Section 6052 indicates an intention that the source of the funds for payment of the tax is the purchaser, but that the seller and the purchaser are free to contract in accordance with their wishes as to the total amount of the selling price. 8/8/52.

460.0021 **Collection of Sales Tax from Lessee on Fair Rental Value.** A lessor of Mobile Transportation Equipment (MTE) has elected to pay tax on the purchase price of trucks it leases. The lessor indicates that in the future, it wishes to purchase the trucks ex-tax by issuing resale certificates and then collect ''sales tax'' from its customers based on the fair rental value. To simplify accounting procedures and to treat customers with consistency, the lessor proposes to charge ''sales tax'' on all truck rentals whether or not it has previously paid tax on the purchase price of a specific truck. All amounts collected as ''sales tax'' would be remitted to the state.

The use tax liability on the lease of MTE purchased under a resale certificate is payable by the lessor rather than the lessee. Since the lessor did not make a timely election to pay tax on fair rental value for its existing inventory, the lessor has no election to pay tax measured by fair rental value by collecting further tax from the lessees on the tax-paid trucks. The lessor must abide by the tax consequences of its choice on the trucks it paid tax upon the purchase price. 7/30/90.

460.0022 **Credit Interest.** Under *Decorative Carpets, Inc.* v. *State Board of Equalization* 58 Cal.2d 252, a tax refund may be conditioned upon return of tax reimbursement to the buyer by the retailer. However, the case is silent as to the allocation of interest. Accordingly, interest on refunds cannot be conditioned on payment of interest by the retailer to the buyer. 6/4/81.

460.0023 **Discounts Equal Tax Reimbursement.** A retailer offers a discount on selected lines of merchandise. For purposes of administrative convenience, the discount rate is set to equal the rate of sales tax reimbursement. Since the sales tax is equal to the discount, no separate charge for sales tax reimbursement is made to customers. All of the sales at selected registers will be discounted. The retailer will be in compliance with Regulation 1700 as long as he fully advises his customers before the sale that the particular merchandise sold at the particular register will receive a discounted price and that a resulting price of taxable items does include reimbursement for sales tax. 4/7/77.

REIMBURSEMENT, ETC. (Contd.)

460.0024 **Excess Tax Reimbursement.** An overage in a tax reimbursement account in the taxpayer's records is not excess tax reimbursement which must be returned to the customer provided that amount is not the result of the collection of tax reimbursement on a nontaxable sale, reimbursement in excess of the taxable amount, reimbursement at a rate higher than the actual rate, or mathematical or clerical errors. For example, an overage resulting from rounding that occurs by following prescribed reimbursement charts is not excess tax reimbursement subject to refund to the customer or payment to the state. 10/29/96.

460.0025 **Excess Tax Reimbursement—Intent to Evade Tax.** In a Petition for Redetermination, the taxpayer claims that it charged sales tax reimbursement on design charges which it believed in good faith were not subject to tax. It collected and retained the tax reimbursement only as a way to obtain extra payment for services without causing customer complaints. Therefore, the taxpayer concludes, its failure to pay tax on these charges was not due to an intent to evade tax, but that it intended to defraud its customers, not the state, and the fraud penalty thus cannot be sustained. The taxpayer relied on a statement in *Marchica* v. *State Board of Equalization* 107 Cal.App.2d 501 (1951) which cited a federal income tax case.

Federal income tax cases for the statement in question are not relevant because the sales tax, unlike the income tax, can be passed on to customers as a separately stated charge. The fraud penalty here is proper since the taxpayer knowingly and intentionally collected money from customers under a false representation that it was sales tax which would be paid to the state and then retained the money as its own profit. There is nothing in the *Marchica* opinion to indicate that the taxpayer had charged tax reimbursement to customers. The only question before the court was whether a mere understatement of tax, without more, was sufficient to sustain a fraud penalty. The court was not asked to decide, and in fact did not decide, whether the penalty is proper when a person knowingly collects and retains tax reimbursement. 10/1/96.

460.0026 **Excess Tax Reimbursement—Lease and Sublease Situation.** A prime lessor/retailer collected tax reimbursement from a sublessor. The sublessor also collected an amount designated as tax from the sublessee. Under this situation, the sublease is not a taxable sale or use and the proper party to file a claim for refund is the sublessor.

On the other hand, where a prime lessor paid to the state an amount equal to the use tax or rental receipts without billing or collecting reimbursement from the sublessor and the sublessor, not knowing the prime lessor was reporting these amounts, collected and reported tax on its rental receipts, the prime lessor's transaction is a sale for resale. Therefore, the tax paid by the prime lessor is refundable to the prime lessor and tax is correctly due on the sublessor's rental receipts. 5/14/87.

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REIMBURSEMENT, ETC. (Contd.)

460.0030 **Fixed Price Contract.** A contract that provides that the buyer will pay tax reimbursement as applicable is not a fixed price contract. If there is a change in the exemption statute or in the tax rate, the application of tax is in accordance with the change. 1/5/95.

460.0040 **"Knowingly Computed" Overpayments.** Overpayment of less than 1 percent of total tax paid is not evidence of known overpayment. ''Knowingly computed'' means computed at the point of sale and rung up, and not at the close of the day or some later time when totals are checked. 9/29/64.

460.0120 **Monthly Billings.** A separate statement on monthly billings of the tax applicable to the amount of such billings constitutes substantial compliance with the provisions of Regulation 1700. 11/15/54.

460.0140 **Offsets.** The retailer must actually refund amounts collected as tax reimbursement to his customers rather than give an offset or credit unless he can show one of the following:

1. The customer agrees to a credit;

2. The debt running from customer to retailer is acknowledged by the customer or made certain by a court proceeding.

In no event can the retailer satisfy the above requirement by giving customers credit toward future purchases unless specific authorization is obtained from them in advance. 12/15/65.

460.0141 **Offsets.** Once the parties are advised of the proper application of tax, the offset provisions of Regulation 1700(b)(4) no longer apply. Any subsequent excess tax reimbursement must either be returned to customers or paid to the state. 1/8/92.

460.0144 **Offsets-Excess Tax Reimbursement.** In general, a taxpayer who is providing a service (not transferring property to customers) would not be entitled to a credit or an offset against its own use tax liability with respect to any excess tax reimbursement collected from customers because it would not be regarded as transferring property within the meaning of Section 6901.5 and Regulation 1700(b)(4).

However, when the taxpayer collected the excess tax reimbursement as a result of the Sales and Use Tax Department erroneously taking the position that the transactions constituted sales and leases of tangible personal property, the offset should be allowed against the use tax liability incurred by taxpayer on the same transactions. The offset should only be allowed for the periods before the taxpayer was notified that it was providing a service rather than transferring tangible personal property. 3/14/95.

460.0145 **Offsets of Excess Tax Reimbursement.** An advertising agency billed a client for finished artwork and for a construction contract to install signs on the same invoice. The agency charged sales tax reimbursement on the construction contract, but failed to do so on the sale of the finished artwork. Although the two errors regarding the sales tax reimbursement were made on the same invoice, this

REIMBURSEMENT, ETC. (Contd.)

does not mean they are part of the same transaction. Regulation 1700(b)(4) states that tax reimbursement collected on a specific transaction can only be used to satisfy a tax liability arising from the same transaction. The same transaction means all activities involved in the acquisition and disposition of the "same property." Signs and finished artwork are not the same property. Therefore, the excess tax reimbursement collected in one transaction cannot be offset against the noncollection of tax in another, even if billed on the same invoice. 9/15/93.

460.0146 **Offsets-Excess Tax Reimbursement.** When a taxpayer transferred property to its customers, it regarded the transfers as sales and therefore collected sales tax reimbursement from its customers and reported the sales tax to the Board. It was subsequently determined that the property being transferred to the customer was incidental to the performance of a service. As a result, it was determined that the taxpayer had collected excess tax reimbursement from its customers.

Since the taxpayer is the consumer of the property transferred incidental to performing the service, use tax is due on the cost price of the property which was purchased ex-tax. The taxpayer may offset only the excess tax reimbursement which it mistakenly collected against its use tax liability on the use of the property transferred incidental to the providing of the service. Once the taxpayer knew that its transactions were not subject to sales tax, any amounts thereafter collected as sales tax reimbursement cannot be used as offset against its own tax liability. 2/6/95.

460.0148 **Offsets—Excess Tax Reimbursement, Construction Contract.** A construction contractor is in the business of installing concrete walls on real property for a lump-sum price. The contractor is collecting sales tax reimbursement on the total amount billed to the customer and paying sales tax to the Board.

Premade concrete walls are "materials" when installed as improvements to real property. The contractor is the consumer of materials used in making concrete walls when the contract is for a lump-sum price. Since the contractor is the consumer of the materials and it has not paid tax or tax reimbursement on the purchase price of the materials, it owes use tax on the purchase price of the materials. It owes no sales tax on the contract price and may not collect any amount as sales tax reimbursement.

Because the contractor has been collecting sales tax reimbursement on the full contract price, the amount collected constitutes excess tax reimbursement. Such amounts must be refunded to the customer or paid to the state (as the taxpayer has done).

For past periods, the contractor owes use tax on the purchase price of materials which it purchased ex tax. However, under Regulation 1700(b)(4), since the taxpayer did not knowingly collect the excess reimbursement, the use tax liability will be offset by the excess tax reimbursement remitted to the Board. The contractor must immediately cease collecting such amounts from its customers and instead must report use tax on its purchases of materials. 7/17/95.

REIMBURSEMENT, ETC. (Contd.)

460.0148.300 **Optional Maintenance Contracts-Tax Reimbursement.** The taxpayer is the consumer of repair parts and materials furnished in performing the repairs pursuant to an optional maintenance contract and tax applies to the sale of such property to the repairer or to the use by the repairer of that property. Since no tax is due on the charge for an optional maintenance contract not involving software, amounts collected from customers as tax or tax reimbursement on those charges constitute excess tax reimbursement. This is true even if the amount collected is measured by the estimated cost of parts and materials to be used. 05/21/96.

460.0149 **Posted Sign—All Prices Include Sales Tax.** A retailer posts a sign that states: ''All Prices Include Sales Tax.'' The retailer sells an item for consumption on his premises and reports it as taxable, taking a tax-included deduction allowance. He sells the same item to go, at the same price as for consumption on the premises, and deducts the full sales price as an exempt to-go sale.

Civil Code section 1656.1 provides a presumption that the parties agreed to the addition of sales tax reimbursement if a sign is posted that reimbursement will be added to the sales price ''of all items or certain items, whichever is applicable.'' Based on this provision, it must be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of all items, even exempt sales, in conformity with the sign actually posted by the retailer. That is, the retailer represented that the sales tax reimbursement would be collected on exempt sales and the customer paid it. This is excess tax reimbursement under Revenue and Taxation Code section 6901.5. However, it is excess tax reimbursement by virtue of the presumption set forth in Civil Code section 1656.1. That presumption is rebuttable (section 1656.1(d)). To rebut the presumption, the retailer would have to show that the amount presumed to have been represented and paid as sales tax reimbursement was understood by the purchaser to have been for some other purpose.

On the other hand, if the sign states, ''all prices include applicable sales tax,'' there would be no excess tax reimbursement included. The meaning of this sign is that sales tax reimbursement is added only to those sales which are taxable. 7/2/87.

460.0150 **Posted Tax Included Statements on Vending Machines.** A statement on vending machines such as ''tax included on all taxable items'' or ''applicable tax included'' presumes that tax is included only on taxable items and no excess tax reimbursement exists. On the other hand, a statement such as ''all sales include tax reimbursement'' creates a presumption that tax was charged on all sales and, to the extent there were exempt sales, excess tax reimbursement would exist. 9/9/93; 9/28/94.

460.0170 **Refund of Excess Tax Reimbursement to Customers.** Amounts of erroneously collected sales tax reimbursement, refunded to customers, may be deducted on the retailer's sales tax return only if the sale and return occur in the

REIMBURSEMENT, ETC. (Contd.)

same period. If the sale was made in a previous reporting period, the retailer must file a claim for refund rather than deduct the amount refunded on a subsequent return. 8/25/93.

460.0175 **Refunds.** A taxpayer who is a carpet wholesaler charges and collects sales tax reimbursement on sales of sample sets and store-use merchandise sold to its dealers. If the dealer reaches a certain sales quota in a given year, the taxpayer will refund the amount paid for the samples and store-use items.

In as much as the collection of sales tax reimbursement is a contractual matter rather than a sales tax law provision, the taxpayer may, if he chooses, refund the amount paid which was designated as tax on the subject items. However, the gross receipts from those sales remain taxable and no reduction of taxable sales is allowed because of the refund of the amount paid for the samples, etc., regardless of whether or not the refund includes the sales tax reimbursement paid by the dealer. 6/20/89.

460.0177 **Refunds Under SB 263.** Gasoline sellers may not submit claims for refund of a district tax declared unconstitutional by the court and the provisions of SB 263 apply. The statement on the pump that the price includes sales tax makes it clear that the tax has not been absorbed by the retailer. The Legislature has provided the only method for dealing with this issue which is a refund to the person bearing the economic burden of the tax. Such person generally will receive effective refunds through the tax credits provided by the legislation. 1/4/94.

460.0180 **Refusal to Pay Tax Reimbursement.** The retailer is responsible for the payment of sales tax on paper sold by him to the Department of Motor Vehicles. There is no exemption for sales to the State of California or its political subdivisions. Since sales tax is imposed on the retailer, the refusal of the Department to reimburse him does not exempt the retailer from tax liability. 9/23/64.

460.0198 **Rounding Off to Nearest Nickel.** A taxpayer is proposing to round the total of its charge, after sales tax reimbursement is added to the nearest nickel. For example, when the food and beverage is $24.45 and tax reimbursement is $2.08, totaling $26.53, the taxpayer proposes to round the total up by 2 cents (to $26.55) and still report and pay the sales tax of $2.08 on $24.45. As an example of rounding down, when the food and beverage is $24.40 and tax reimbursement is $2.07, totaling $26.47, the taxpayer proposes to round the total down by 2 cents and still report and pay sales tax of $2.07 on $24.40.

If the taxpayer does not indicate to the customer that the additional 2 cents (rounding up) is sales tax (reimbursement), the taxpayer would be increasing its gross receipts by 2 cents but not reporting sales tax on those additional gross receipts. On the other hand, if the taxpayer indicates to the customer that the additional amount for rounding up were sales tax (reimbursement), the taxpayer would be collecting 2 cents excess tax reimbursement. The taxpayer may not do so.

REIMBURSEMENT, ETC. (Contd.)

In the example for rounding down, if the taxpayer does not indicate to the customer that the 2 cents being deducted is taken from sales tax (reimbursement), the gross receipts would be decreased by 2 cents but the taxpayer would be collecting excess sales tax reimbursement which the taxpayer may not do (that is, the taxpayer would be collecting tax reimbursement on $24.40 but receiving taxable gross receipts of only $24.38). On the other hand, if the taxpayer indicates to the customer that the 2 cents rounding down is reducing the sales tax (reimbursement), the taxpayer would be undercollecting sales tax (reimbursement). The taxpayer may undercollect sales tax reimbursement as long as the taxpayer reports and remits to the Board the sales tax based on the actual gross receipts, which in this case would be $24.40.

In summary, this proposal results in improperly collecting and remitting to the Board either more tax than is due or less tax than is due. 4/4/94.

460.0210 **Sales Tax Credit.** A taxpayer located in this state has been audited and assessed sales tax on certain transactions. The audit may have utilized either a block or random statistical sample. After completion of the audit, the taxpayer decides to do a complete review of sales during the audit period to recover sales tax reimbursement from its customers.

If, as a result of the complete review, the taxpayer is able to collect tax greater than that assessed in the Board's audit, the taxpayer is not entitled to keep the excess. The Board could issue a new determination for the same period, assessing the tax with respect to transactions not included in the previous assessment. The taxpayer has an obligation to return the excess amount collected to the persons from whom the additional sales tax reimbursement was collected if payment is not made to the state.

If, as a result of the complete review, the taxpayer determines that the actual tax due is less than assessed as a result of the Board's sample audit, the taxpayer is entitled to a refund of the difference, provided a claim for refund is filed within the period authorized by the statute of limitation. The key period is the six-month period commencing with the overpayment. Any claim filed within this period would allow the entire amount of overpayment. In the event the claim was not filed within the six-month period, some portion of the amount subject to refund also may be within the three-year limitation rule, which is measured from the period with respect to which the tax should have been paid.

In a use tax collection situation, the taxpayer must report and pay to the state any additional use tax collected from California customers. If there has been an overpayment, the taxpayer may file its claim for refund if the taxpayer has paid the amount in question out of its own pocket in satisfaction of its obligation. 4/4/88.

460.0220 **Sales Tax Included—Medicare.** If Medicare determined it was appropriate to include sales tax in the calculation of the basic fee of particular items, it would be appropriate to adjust for sales tax included. However, the Medicare basic fee schedule does not provide a guide for determining which sales Medicare has determined to be taxable and which exempt. The Board will not

REIMBURSEMENT, ETC. (Contd.)

assume all reimbursement included tax reimbursement because the Medicare Carrier Manual indicates that a ''reasonable charge'' will include sales tax reimbursement only ''where appropriate.'' Further, it provides sales tax reimbursement will not be a ''reasonable charge'' if not all providers in the area bill the tax reimbursement. Thus, it is necessary for the provider to maintain sufficient records to show on which items Medicare included tax in the reimbursement and the amount of tax included. 8/2/95.

460.0240 **Sister States.** Even though other sovereign states are not subject to a sales or use tax imposed directly upon them, a retailer selling to a sister state is liable for sales tax and the question of his collecting reimbursement for the tax is a matter between the retailer and his customer, the sister state. 10/15/69.

460.0242 **Internet Order Form.** An Internet order form invites purchasers to buy merchandise for an amount plus ''tax and shipping.'' The shipping cost is set at a fixed price for sales in California, to which an additional amount is added for sales outside the state, depending on the destination ZIP code. The purchaser is given a lump-sum statement of the total amount due via e-mail or telephone call. In all cases the purchaser pays a final charge that is greater than the printed prices on the order form.

In the absence of a sales invoice or other documentation containing a separately stated charge for tax and shipping, the Internet order form acts as the agreement of sale. The information contained on the order form states that the purchaser will be charged tax and the purchaser is actually charged some additional amount that appears to be sales tax reimbursement. Therefore, it is presumed that both parties agreed to the addition of sales tax reimbursement. Where tax reimbursement was charged, collected and reported on exempt sales to out-of-state customers, this is excess tax reimbursement that can be refunded to the customers from whom it was collected. 1/23/02.

460.0245 **Statement That "Tax is Included Where Applicable."** A retailer makes sales both inside and outside California. It advertises that its price ''includes shipping and sales tax where applicable.''

The statement is sufficient to prevent a conclusion that excess sales tax reimbursement is being collected on exempt sales to out-of-state customers. 3/30/76.

460.0256 **Tax Included.** Use tax collected from customers must be separately stated. The seller must give the buyer a receipt for the tax. Property subject to use tax cannot be sold on a tax-included basis. 4/15/94.

460.0258 **Tax Included in Price.** In determining whether prices are tax included, it is insufficient for a taxpayer to adjust its selling price to include tax liability. There must be a clear notice to customers that tax has been included. 4/22/77.

REIMBURSEMENT, ETC. (Contd.)

460.0260 **Tax-Included Prices.** A retailer who claims that its sales were on a tax-included basis must show that buyers were clearly informed of this method of charging at the time the sales were made. The posting of a sign in a foreign language does not constitute clear notification to all customers. Additionally, evidence that tax reimbursement was charged on some invoices refutes claims that customers were notified at the time of the sale. 1/7/94.

460.0268 **Tax Rate on Out-of-State Periodical Subscription.** The tax rate applicable on a subscription to a periodical from an out-of-state publisher is the tax rate that corresponds to the zip code of the subscriber's residence when the publisher is a retailer engaged in business in this state pursuant to subdivisions (a), (b), or (c) of Revenue and Taxation Code section 6203. 4/23/92

(Note statutory change operative 11/1/92.)

460.0280 **Tax Reimbursement on Optional Maintenance Contracts.** The charging of tax reimbursement on parts under an optional maintenance contract constitutes excess tax reimbursement. The seller of the maintenance contract is the consumer of all parts used in the performance of the contract. 6/20/94.

RELIGIOUS ORGANIZATIONS
Meals served by, see Taxable Sales of Food Products.

465.0000 REMEDIES OF TAXPAYERS

(a) REDETERMINATIONS

465.0010 **Applications of Credit.** The following applies to determinations and the application of credit:

(1) A credit for a different period may properly be offset against a determination which is not final. An offset does not require that a notice of determination be final. (See Section 6483).

(2) The statute of limitation may bar the assessment and collection of any sums, but it does not obliterate the right of the Board to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.

(3) The application of a credit to an existing liability is a procedural matter, and the Board is not required to grant a hearing on how a credit is applied. 12/3/93.

465.0012 **Interested Party—No Right to Overpayment.** A person permitted to file a petition as an "interested party" under section 6561 is not necessarily entitled to any amounts ultimately determined to have been overpaid. For example, if a fully-paid determination is redetermined to zero, the interested party filing the petition would normally not be issued a refund of the amounts overpaid. To do so would be to determine that the interested party had the right to the overpayment rather than just a direct interest in the determination. The only conclusion made when the interested party was permitted to file the petition was that he/she had a direct interest in the matter. 10/2/89.

REMEDIES OF TAXPAYERS (Contd.)

465.0014 **Limitation Period—Correction of Notice of Redetermination.** The Board issued a determination against a taxpayer on April 25, 1990. The taxpayer petitioned the determination and, after an adjustment was made to the tax liability, a Notice of Redetermination dated January 24, 1994 was issued. That Notice redetermined the amount of tax due, but a computer operator input error was made on the interest portion of redetermination resulting in an overall credit balance. The error in the calculation of interest seemed to indicate that, although an amount of tax was redetermined against the taxpayer and it had not made any payment toward that amount, the taxpayer was entitled to a refund. The taxpayer filed no claim for refund nor was any amount ever refunded by the Board on this erroneous credit balance. The interest error was thereafter discovered and the taxpayer was notified that the Board intended to collect the amount of tax redetermined, plus interest as required by law. The taxpayer claimed that the statute of limitations had expired and the Board had no legal basis to reissue the redetermination.

The statute of limitations does not apply to the above situation and, even if it did, the Board is not barred from collecting the correct amount due. The determination in this case was issued on April 25, 1990 for the period of April 1, 1985 through December 31, 1987, well within the statutory period (the taxpayer had not filed returns). In this case, the taxpayer knew that there was a tax deficiency owed for unpaid taxes. Likewise, the taxpayer knew, or should have known, of the error in calculating interest which resulted in a credit balance since the taxpayer had not made any payment on the deficiency. Had taxpayer believed the credit balance to have been correct, it would have presumably filed a claim for refund of the amount of that credit balance. However, the filing of such a claim would have triggered the Board's review which would have resulted in the Board correcting the mistake. The taxpayer did not file such a claim.

The taxpayer owes the amount of tax reflected in the Notice of Redetermination with interest thereon in accordance with law. No further determination is required. 1/23/97.

465.0015 **Limitation Period—Section 6596.** A taxpayer may claim relief from tax liability determined before the effective date of section 6596 (1/1/85) if the claim is filed before the liability becomes final. If it should become final, it would be necessary for the taxpayer to pay the liability in full and file a claim for refund. The Board may consider claims for relief of liability based on erroneous written Board advice even if the liability became final before the effective date of section 6596 as long as there is some unexpired period for which the taxpayer can file a claim for refund under section 6902. 12/30/85.

465.0017 **Person Directly Interested—Section 6561.** A predecessor sold a business to a successor who subsequently defaulted on the purchase price. The predecessor filed suit and obtained a court order for appointment of a receiver. The receiver sold the business and, except for the liquor license, the proceeds of the sales were distributed to creditors. A notice of successor liability was issued

REMEDIES OF TAXPAYERS (Contd.)

against the successor and the Board placed a withhold on the liquor license to prevent its transfer since it was the only remaining asset available to satisfy the notice of successor liability.

The predecessor filed a petition for reconsideration of the notice of successor liability issued to the successor, contending that he qualifies as an interested party since he is the ''directly benefited creditor.'' The predecessor will receive the proceeds from the sale of the liquor license.

Under the facts described, the predecessor is a person directly interested in the notice of successor liability issued against the successor. Any amounts remaining from the liquor license sale proceeds, after payment of the determination, will be available to satisfy the liability the successor owes to the predecessor. Thus, the predecessor may file a petition for reconsideration and may be given information as to the items included in the measure and amounts of any unpaid tax or amounts of tax required to be collected, interest, and penalties. 10/2/89.

465.0020 **"Preliminary" Hearing.** The ''hearing'' referred to in Section 6563, Revenue and Taxation Code, is the board hearing on a petition for redetermination, and not the preliminary hearing which may be held for the purpose of accommodating taxpayers at the most convenient location and reducing the controversy to the basic facts in issue. A preliminary hearing in no way prohibits taxpayers from having a board hearing if one is desired. 1/5/61.

465.0025 **Taxpayers' Rights Advocate—Effect of Stay.** The language of section 7083 ''Applicable statute of limitations shall be tolled during the pendency of a stay'' means that while the action is stayed, all applicable statutes of limitation are held in abeyance or tolled. For example, a taxpayer will have additional time to file a petition for redetermination. The taxpayer must be notified when the stay is lifted that the statutes of limitation are again applicable and that the taxpayer must comply with the time limits prescribed by law. 5/9/90.

465.0030 **Withdrawal of Petition for Redetermination.** At a preliminary hearing on a taxpayer's petition for redetermination, the audit staff orally stated that the petitioner might be liable for additional tax on manufacturing aids. The staff indicated its intention to ascertain the amounts of such tax by further review of petitioner's records. The petitioner then sent a letter to the Board's headquarters' staff to withdraw its petition for redetermination. Thereafter, the Decision and Recommendation of the hearing officer was mailed to the petitioner, which directed the audit staff to make a reaudit to determine the amount of the additional tax with respect to manufacturing aids. Subsequently, the headquarters' staff sent a letter to petitioner notifying petitioner of a proposed increase in the determination for use tax on manufacturing aids.

The taxpayer contends that since its petition for redetermination has been withdrawn, the determination cannot now be increased.

There is nothing in the Sales and Use Tax Law which expressly authorizes or expressly prohibits withdrawal of a petition for redetermination. The Board, as a matter of administrative practice, does not allow petitions to be withdrawn. For every petition which is filed, a notice of redetermination is ultimately issued by

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the Board even if the taxpayer has indicated a desire not to pursue the matter any further. No petition for redetermination is simply dropped without a redetermination by the Board. If the Board allowed petitions to be withdrawn without redetermination, the original determination would therefore never become final and could never be collected. Since petitioner could not withdraw its petition, petitioner's attempt to do so is merely a waiver of attendance at any future hearings. (Petitioner will not be bound by this waiver. If petitioner wishes to have a Board hearing; one will be granted.)

The waiver of attendance at the Board hearing does not prohibit the Board from asserting a valid claim for increase or from increasing a determination. Section 6563 provides that the Board may increase a determination at any time before it becomes final provided only that a claim for the increase is asserted at or before the Board hearing. The occurrence of a Board hearing is merely a limiting factor and not a condition precedent to asserting the increase. That is, if a Board hearing is held, the claim for increase must be asserted at or before the hearing. However, if a Board hearing is not held, the claim for increase may be asserted and the determination may be increased at any time before the determination become final.

In the above situation, although petitioner attempted to withdraw its petition; a redetermination has not been issued and the matter has not become final. Furthermore, a Board hearing has not as yet been held. Accordingly, the staff's letter to the petitioner is a timely claim for increase. 6/28/83.

465.0031 **Withdrawal of Petition for Redetermination.** The withdrawal of a petition for redetermination does not prohibit the Board from increasing a determination within the following time frames. If a Board hearing is held, the claim for increase must be asserted at or before the hearing. However, if a Board hearing is not held, the claim for increase may be asserted and the determination may be increased at any time before the determination becomes final, provided the limitation of section 6563 has not expired. Under section 6561, once a petition has been timely filed, the original determination does not become final. Under section 6564, the decision of the board on the petition becomes final only after notice of redetermination is issued. If the Board allowed petitions to be withdrawn without redetermination, the original determination would therefore never become final and could never be collected. 6/28/83.

(b) REFUND.

(1) GENERALLY

465.0035 **Assignment of Refunds.** Tax refund warrants must be issued with only the taxpayer as the payee. The Board cannot honor a power of attorney which contains an assignment provision by which the claimant purports to assign the total refund of sales or use tax to another person. 4/6/90.

465.0040 **Illegal Collection.** Section 6901 permits refunds where tax "has been paid more than once or has been erroneously or illegally collected or computed." Where a jeopardy determination is issued against a purported partnership and a

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lien is recorded on one of the purported partner's real estate, a protested payment by the purported partner is involuntary and coerced. He is entitled to a refund under Section 6901 upon a showing that he did not, in fact, have an interest in the business even though the tax is clearly due because the coerced payment constitutes an ''illegal collection'' within the meaning of the refund statute. 9/4/64.

465.0050 **Offsets Against Nonfinal Liabilities** A pending refund may be offset against a nonfinal determination. Although section 6901 requires the Board to refund any amount not offset against taxes then due and payable, it is not necessary that a determination be final for the taxes thereon to be ''due and payable.'' In *People* v. *Buckles,* 57 Cal.App.2d 75 (1943), the court said: ''This does not justify a holding that such taxes were 'not due and payable' . . . because as a matter of plain fact they were taxes which the vendor had failed to pay but which he became obligated to pay under the action when the taxable sales were made.'' A determination does not create a new obligation or liability but merely is a determination by the Board of the amounts the taxpayer had failed to pay. 7/28/92.

465.0056 **Offsets to Refunds. "Due & Payable".** Some taxpayers who have made overpayments of sales or use tax object to the delay in issuing a refund, while nonfinal items representing underpayments are being considered. They oppose the offset of the overpayment against the nonfinal underpayment on the grounds that section 6901 says overpayments shall be offset against ''amounts then due and payable,'' and allege that nonfinal items are not due and payable. They rely on the fact that determinations are ''due and payable'' when they become final.

The language governing the meaning of due and payable is in section 6451, which states, ''The taxes imposed by this part are due and payable to the Board quarterly on or before the last day of the month next succeeding each quarterly period.'' Therefore, sales and use taxes are due and payable when they are required to be reported, and if, upon audit, an underpayment of reported amounts is discovered and an assessment is made, the amount of the tax assessed was due and payable on the due date of the return on which the tax should have been reported. That is why interest begins to accrue on the due date of that return.

Even when there is a petition for redetermination, when the determination becomes final and thus due and payable under section 6565, the interest is nevertheless calculated from the date the tax was due and payable under section 6451. The use of the term ''due and payable'' in the context of a determination means that, until it is final, efforts to collect funds in the hands of the taxpayer or third parties on behalf of the taxpayer are stayed. Although collection action has been stayed, the Board has determined that there is an underpayment and there has been no administrative decision overturning that determination. Section 6483 contemplates the use of offsets on both notice of determination which have been issued as well as any unpaid self assessed taxes. 8/25/94.

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465.0060 **Refund to Customer.** A refund to a construction contractor will not be denied where the contractor refunded to the customer only the tax measured by the difference between the gross contract price and the taxable material cost. Under the rule in the Decorative Carpets case, the California Supreme Court indicated that a taxpayer, under similar circumstances, could have secured a refund by returning to its customer the amount of the refund sued for. It is not required that the taxpayer refund the total amount of tax reimbursement collected before any refund may be had. 4/13/64.

465.0062 **Refund of Sales Tax Paid on Exempt Transaction.** A licensed auto dealer wants to export a new auto overseas which it will purchase from a new car franchised dealer. The franchised dealer is required by the factory to collect amounts as sales tax and license fees on all sales of vehicles at wholesale or retail. The vehicle will be picked up at the franchise dealer's location by a PUC licensed trucking company and taken directly to the port and loaded on a boat.

An amount paid to the retailer by the purchaser itemized as sales tax is not imposed by the state on the purchaser. It is a tax imposed on the retailer. The purchaser has no standing to file a claim for the refund with the Board for such amounts since the purchaser made no payments of sales tax to the Board. Instead, the retailer is the only person who may file a claim for refund of sales taxes which the retailer believes it overpaid. When a retailer has collected reimbursement for sales tax and the retailer claims it overpaid to the Board, the Board will not grant the refund unless the retailer refunds any such reimbursement to the purchaser (Regulation 1700(b)(2).) In this case, only the new car franchise dealer may make a claim for refund of sales taxes to the Board. 5/10/95.

465.0064 **Refund to Person Making Overpayment.** A demand is made on the surety company for $2,000 which is the amount paid to the Board. Subsequently, the trustee for the taxpayer sent the Board a check for $3,666.90 in payment for the liability owed by the taxpayer. This resulted in an overpayment of $2,000.

Under section 6901 a refund can only be made to the person who made the overpayment. As the overpayment in this case did not occur until the trustee paid the $3,666.90, it is the trustee to whom the Board has the authority to pay the refund. There is no statutory authority to pay a surety unless it is the surety's payment which causes the overpayment. 8/17/79.

465.0065 **Refund of Tax Incorrectly Collected on Rental Receipts When Transaction is a Sale at Inception.** A taxpayer requested a refund of taxes incorrectly collected and reported on rental receipts on a contract designated as a lease which was actually a sale at inception. The taxpayer is entitled to a refund only if the payments he has made exceed the amount he should have paid as provided in Regulation 1641 with respect to the sale at inception, taking into account any interest due for late payment of such amount. 8/22/97. (M98–3).

465.0066 **Refund of Tax Paid To a Section 6015 Retailer.** If an agent of a section 6015 retailer, after prepayment of tax to the retailer, uses the property instead of selling it, a refund is due on the difference between the retail sales price on which tax was computed and the cost of the property to the agent. Also, if the

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property is destroyed, a refund would be allowed for the total amount paid by the agent to the section 6015 retailer. 8/9/71.

465.0074 **Reliance on Written Advice—Identifying Taxpayer.** A taxpayer's representative wrote a letter to the Board's legal staff regarding the application of tax to its client's operations without identifying the client's name. The Board's response to the representative's letter did not come within the provisions of section 6596 since the client's name was not identified to the Board.

The representative subsequently wrote another letter which identified the client in the previous letter in order that the client may rely on the written advice the representative received from the Board.

Letters falling within the parameters of section 6596 are never "retroactive" to the date of any other correspondence. Thus, the taxpayer may not rely on previous correspondence from the Board to an unidentified taxpayer even if the factual situation in the letter to the unidentified taxpayer is identical to the situation of the identified taxpayer. This is true even though the representative now states that the taxpayer was the unidentified person in the previous correspondence. If the taxpayer had wanted an opinion coming within section 6596 in response to its first letter, the client had to have been identified in that request. 2/16/96.

465.0076 **Section 6483—Offsets.** Section 6483, "Offsets," provides that the Board may offset overpayments, for a period or periods, against underpayments for another period, or periods. Section 6902 contains refund and credit limitation provisions specifically applicable to determinations. In effect, section 6902 states that no refund or credit may be approved after six months from the date the determination becomes final unless a claim is filed. This has been interpreted to mean that, within the stated six month period, the entire determination period is open to credit adjustments. Accordingly, the administrative procedure is to allow for offsets to the amount of a paid determination as long as the credit (offset) does not result in a net refund for the period covered by the determination regardless of whether the credit is related to an issue in the determination, as long as a claim was filed within six months of the date of the determination. In other words, the filing of claim within six month period allows any credit subsequently developed to be applied to periods which would ordinarily be beyond the three year statutory period. Offsets will be allowed regardless of whether the credit was in the same quarter within the deficiency and regardless of whether the credit item was related to the matter in the deficiency determination.

In applying any credit, the offset should be first applied to the periods in the determination which are beyond the three year statute of limitations. This procedure will provide the taxpayer with the greatest benefit. 7/27/96. (Am. M99–1).

465.0077 **Section 6902.2 Refund.** Shareholders of an S-Corporation may not claim a section 6902.2 refund where the S-Corporation claims the Manufacturer's Investment Credit (MIC) and then "passes through" the MIC to its shareholders. Section 6902.2 only authorizes a refund to a person that has paid

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sales tax reimbursement to a retailer or use tax on a purchase of property for which MIC credit may be allowed. Where an S-Corporation (and not the shareholders) purchases and pays tax on tangible personal property, the section 6902.2 refund is only available to the S-Corporation and not the shareholders since the shareholders would not have paid tax on the S-Corporation's purchases. 1/18/96.

465.0078 **Section 6902.2 Refund.** Section 6902.2 authorizes a refund for an amount that would otherwise be allowed pursuant to the Manufacturer's Investment Credit (MIC). When an S-Corporation claims the MIC, it gets the benefit of only 33 percent of the MIC while the shareholders also receive a benefit from the MIC. Only the 33 percent of the MIC available to the S-Corporation is subject to the section 6902.2 refund; no portion of the MIC that would benefit the shareholders is subject to refund under section 6902.2.

In addition, where an S-Corporation purchases tangible personal property, the section 6902.2 refund for tax paid by the S-Corporation is only available to the S-Corporation and not the shareholders since the shareholders would not have paid tax on the S-Corporation's purchases. 7/15/99. (2000–1).

465.0079 **Statute of Limitation.** If a taxpayer self-assesses and pays an amount of tax more than three years from the date the tax was actually due, then at the moment of payment the taxpayer would already be barred from filing a claim for refund under the three-year statute of limitation in section 6902. However, section 6902 provides an alternate statute of limitation of six months from the date of payment. Thus, a claim would still be timely if it is filed within six months from the date of payment, even though it was paid more than three years after the due date. 6/14/99. (2000–1).

465.0080 **Suspended Corporation.** A corporation suspended under Revenue and Taxation Code §23301 for nonpayment of franchise tax is incapable of maintaining a claim for refund for sales taxes before the State Board of Equalization. Its corporate powers, rights and privileges are suspended by this section. 6/25/65.

(2) CLAIMS FOR REFUND

465.0095 **Ability to File Claim.** A common carrier purchased bunker fuel for use in its common carrier operations and sometimes issued its vendor exemption certificates prior to the vendor's billings. These certificates were inexplicably ignored and the vendor billed the carrier for sales tax reimbursement which the carrier paid. The vendor paid the sales tax to the Board on the sales to the carrier. During an audit of the carrier, it sought a credit for ''taxes'' it paid to its vendor on transactions it alleged were exempt under Revenue and Taxation Code section 6385. The carrier relied on *Delta Airlines, Inc.* v. *State Board of Equalization* (1989) 214 Cal.App.3d 518 in arguing that since Delta in that case had standing to sue, the carrier also had standing to obtain the credit for the ''taxes'' it paid its vendor on exempt transactions. The Board disagreed.

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The vendor did not rely on exemption certificates in order to report the sales as exempt, or partially exempt, from sales tax. Neither did the carrier since it paid sales tax reimbursement to the vendor with respect to these transactions. Since the vendor treated itself as a retailer making sales that were fully taxable, the carrier does not have standing to file a claim for refund on its own behalf by virtue of exemption certificates not relied upon by the retailer.

Unlike the situation in Delta Airlines, this carrier's vendor did not treat the sales as exempt pursuant to exemption certificates. When a retailer makes a retail sale of fuel in California to a purchaser, such as this carrier, who will use that fuel both inside and outside California, the applicable tax is a sales tax and not a use tax. With respect to the transactions involved here, there is no basis to treat the carrier as a ''retailer.'' The carrier did not issue exemption certificates to the vendor upon which the vendor relied; the vendor reported its own sales tax liability on these sales. The carrier paid sales tax reimbursement to the vendor, but this was not sales tax. The payment of sales tax reimbursement does not provide the carrier with standing to file a claim for refund for sales tax paid by another person. The vendor has standing to file a claim for refund for any taxes it believes were overpaid. 8/21/90; 9/11/90.

465.0100 **Amendment of Claim After Limitation Period.** A timely claim for refund of tax based on exempt sales in foreign commerce may not be amended after the limitation period has run to make an additional claim based on exempt sales to the United States. Since no timely claim for refund was filed with respect to sales to the United States, and the subject matter of the timely claim for refund gave no notice of such grounds, the board is barred from approving the claim on such grounds under Section 6902, and the taxpayer has waived his right to a refund on such grounds under Section 6904. 9/11/59.

465.0105 **Authorized Signatures.** Board Hearing Procedure Regulation 5057 says a claim for refund ''shall be signed by the taxpayer, his authorized representative or any person directly interested.'' In a sales tax transaction, the tax is imposed on, and paid by, the seller. Although the purchaser may reimburse the seller for the seller's sales tax liability (usually itemized as ''sales tax''), the purchaser is not the taxpayer, nor is the purchaser an interested party within the meaning of Regulation 5057. Thus, the purchaser has no standing to file a claim for refund of sales tax paid by the seller. 3/1/94.

465.0110 **Claim For Refund.** Taxpayer filed a timely claim for refund of taxes voluntarily paid in 1987 on rental receipts from an aircraft it had purchased ex-tax in 1985, leased back to the seller, and then resold two months later, subject to the existing lease. The taxpayer's 1987 payments were not timely for a purchase made in 1985, and thus did not constitute an election to report tax based on fair rental value even though the payments were measured by rental receipts. The amount of tax paid was clearly less than the amount due on the purchase of the aircraft, and tax was due on the purchase price.

REMEDIES OF TAXPAYERS (Contd.)

Even though the Statute of Limitations prevented the Board from assessing the remainder of the tax on the 1985 purchase, no refund is due on tax paid erroneously measured by rental receipts. Any claim will be denied based on *Owens Corning Fiberglass Corp.* vs. *State Board of Equalization* (1974) 39 Cal.App.3d 532. The court upheld the board in that case because at the time of payment the board had the right to issue a deficiency assessment, even though it did not do so, and the amount of tax owed was greater than the amount paid. Thus, there was no overpayment to be refunded. 12/26/90.

465.0115 **Consumer Claiming Refund.** A consumer who has paid sales tax reimbursement to a vendor cannot claim a refund. The refund claim can only be filed by the retailer. 4/7/95.

465.0117 **Date of Overpayment.** A taxpayer erroneously charged tax reimbursement on a nontaxable sale and reported the tax on its second quarter 1992 return. It subsequently determined that the sale was not taxable and timely filed a claim for refund. It issued a credit or refund of the tax reimbursement to its customer in the third quarter 1996. The date of overpayment for purposes of the refund is the second quarter 1992 not the third quarter 1996. The tax is on the retailer and the date of overpayment is the date on which it erroneously remitted the overpayment of the tax. 1/31/97.

465.0120 **Effect of Denial on Second Claim.** Once the board has denied a claim for refund and 90 days has elapsed from the mailing of the notice of denial, the board is without jurisdiction to entertain a second claim for the same tax upon a separate ground even though the three-year limitation period for filing claims has not yet run. 3/13/68.

465.0130 **Erroneous Use Tax Paid on Lease of MTE.** No tax liability on rental payments is incurred by a purchaser, upon the lease of an aircraft which is mobile transportation equipment, unless a timely election to report on rental payments is made. Although the payment of use tax on rental receipts is not applicable, no refund of erroneously paid use tax, as measured by rental receipts, can be allowed unless the lessor can establish that the retailer paid the sales tax to the State, with respect to the original sale of the aircraft. Since the purchaser has not established that sales tax has been paid on the sale, Section 6903 (a) prevents the refund of any tax. 3/25/93.

465.0136 **Lemon Law—Arbitration Not Required.** Under the provision of the ''Lemon Law,'' (section 1793.25 of the Civil Code), arbitration is not required before the Board is authorized to make a refund of the sales tax to the manufacturer or distributor of the vehicle as long as the specific requirements in the Civil Code are satisfied. 10/4/88.

465.0138 **Lemon Law—Limitation Period.** The limitation period under section 6902 with respect to reimbursement paid by manufacturers to the customer for sales tax pursuant to the Lemon Law begins on the date payment is made to the consumer.

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Also, manufacturers are not entitled to reimbursement of sales tax from the Board when restitution from the vehicle was originally made prior to January 1, 1988, the effective date of the "Lemon Law." 10/4/88.

465.0142 **Limitation Period.** When the last day for waiving the statute of limitations (R&TC §6488), filing a petition for redetermination (R&TC §6561), filing a claim for refund (R&TC §6902), filing a suit for refund (R&TC §6933 and §6934), or issuing a determination of sales and use taxes due (R&TC §6487), is computed by excluding the first day and including the last of the specified number of days and when the last day of that number is a Saturday, Sunday, or holiday, the action will still be timely if performed on the first day following which is not a Saturday, Sunday, or holiday. 2/17/77.

465.0143 **Limitation Period.** As a result of the decision in *Holland Furnace Co.* v. *State Board of Equalization* (1960) 177 Cal.App.2d 672, 675–76, the Board interprets section 6902 to provide that a claim is timely if filed within six months of the payment of the tax which is the subject of the claim, without regard to whether the tax was paid pursuant to a determination or was self assessed. 1/18/96.

465.0150 **Limitation Period.** The three year limitation period under section 6902 also applies to payments made as a result of determination. Accordingly, a claim filed August 9, 1989, for a determination which covers a period from April 1, 1984 to March 31, 1987, is timely for payments made for periods beginning July 1, 1986. 6/06/91.

465.0160 **Limitation Period.** A claim for refund filed within six months from the date that a determination becomes final or within six months of the date the determination was paid, is timely only for those amounts included in the determination. However, it is not a timely claim for refund for tax amounts overpaid with returns filed more than three years before the date the claim was filed. This is true even though the tax overpaid on the returns occurred during the same periods which were included in the determination. 7/29/93.

(Refer to section 6483, "Offsets" and Annotation 465.0076for a possible offset allowance.)

465.0180 **Limitation Period.** The taxpayer may file a refund claim within six months from the date of the overpayment regardless of the fact that the statute of limitations would have barred collection of the tax by the state had the person not made the payment voluntarily. 6/21/57.

465.0200 **Limitation Period.** Overpayment based on Federal Excise Tax. The overpayment of sales tax with respect to amounts of Federal retailers' excise tax which it is anticipated will be paid to the Federal Government at a later date occurs in the quarterly period in which the payment is made to the Federal Government. Until that time there is no overpayment of sales tax. Therefore, the limitations period for filing a refund claim for such sales tax overpayments commences to run one month after the close of the quarterly period. 6/8/59.

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465.0210.150 **Limitation Period—Denied Claim for Refund.** A claim for refund was denied by the Board on September 10, 1990. The taxpayer had 90 days after the mailing of the notice of denial to file suit for refund under section 6933. Since taxpayer did not file a suit for refund the Board lost jurisdiction on or about December 10, 1990.

The purpose of the limitation provision is to prevent stale claims and to require taxpayers to support claims of overpayment in a timely manner. Whether or not the claim may have been valid is irrelevant after the limitation period has run. 9/27/91.

465.0210.175 **Limitation Period—Section 6902.4.** Section 6902.4 suspends the statute of limitations for filing a claim for refund during the period of a qualified financial disability, but cannot revive a claim that would have been barred under section 6902 if filed on January 1, 2000 (the effective date of section 6902.4).

For example, on March 31, 1999 the Board issues a determination for the period January 1, 1996 through December 31, 1998 to a taxpayer on a quarterly reporting basis. The taxpayer pays the amount of the determination on May 1, 1999 without filing a petition. On June 1, 2000, the taxpayer files a claim for refund of this payment along with documentation establishing that he/she was financially disabled within the meaning of section 6902.4 for the period May 15, 1999 through May 15, 2000.

The claim would have been timely under section 6902 had it been filed within 6 months of the date the determination became final or within 6 months of the date of the claimed overpayment. The claim here was not filed within either of these two alternative six-month periods, nor would it have been filed within either of them had it been filed on January 1, 2000. Thus, for the two alternative six-month periods specified in section 6902, the claim is barred and cannot be revived by section 6902.4.

A claim is also timely under section 6902 if it is filed within three years from the last day of the month following the close of the quarterly period for which the overpayment was made. The claim here was filed within this three-year period for the second quarter of 1997 and later periods. The claim for these periods is timely without regard to section 6902.4.

The claim for 1996 and the first quarter of 1997 was not filed within the three-year period provided by section 6902 and is thus barred unless section 6902.4 extends the claim period. A claim for the first three quarters of 1996 would not have been timely even if it had been filed on January 1, 2000. Section 6902.4 cannot revive the claim for these quarters and it is thus barred. However, had the claim for the fourth quarter of 1996 and the first quarter of 1997 been filed on January 1, 2000, it would have been timely under the three-year

limitations period of section 6902. This means that section 6902.4 is relevant for these two quarters and extends the otherwise applicable limitations period for the entire period of taxpayer's qualified financial disability (even the portion before January 1, 2000). Taxpayer was financially disabled for one year. The limitations periods for filing a claim for the fourth quarter 1996 and the first quarter 1997 is thus extended to January 31, 2001 and April 30, 2001 respectively. Since the claim was filed before these dates, it is timely under section 6902.4 for these two quarters. 8/28/01.

465.0210.250 **Limitation Period—Suit for Refund.** The Board mailed a denial of a claim for refund to the taxpayer on August 14, 1995. The taxpayer failed to file a suit for refund by November 12, 1995, within the 90-day statutory period provided in section 6933. As a result, the taxpayer has no legal enforceable claim against the State for a refund of the taxes in question. This conclusion conforms with the opinion issued by the Attorney General on July 10, 1942, which specifically provides that, in the absence of statutory authority, the Board does not have jurisdiction to reconsider its denial of a refund claim after the expiration of the 90-day statutory period for filing a suit for refund. Accordingly, the Board may not reconsider its denial of the taxpayer's claim for refund. 2/5/97.

465.0211 **Payment Made to Stop the Running of Interest.** When a petition for redetermination is properly and timely filed, a payment made to stop the running of interest does not convert the petition to a claim for refund nor does the determination become final for purposes of section 6902 and thereby cause the start of the running of the statute of limitations. The petition process continues as though no payment had been made. A claim for refund must be in writing and must state the specific grounds upon which the claim is based. Thus, a claim may contain grounds not raised in a prior petition on the same dispute. 5/14/87.

465.0213 **Prepayment of Sales Tax.** When a person is required to prepay sales tax on its sales of fuel in California, it must prepay sales tax with respect to all such sales. Even if that person makes a retail sale of fuel that is exempt from sales tax, it nevertheless must prepay the sales tax with respect to that sale. However, a person who has made prepayments either directly or to the person from whom the fuel was purchased may obtain a refund or credit if the fuel is exempt from sales tax pursuant to Section 6352, 6357, 6381, and 6396. (See Section 6480.6 and 6480.21). 8/3/92.

465.0214 **Protective Claims for Refund.** The Board cannot act upon a claim for refund until a final determination has been paid (*State Board of Equalization* v. *Superior Court* (1985) 39 Cal.3d 633). Thus, when a taxpayer pays a liability

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through a payment plan with the intent of filing a claim for refund it should do so by filing claims for refund within six months after each installment payment is made in order to protect the taxpayer's rights. These periodic claims are treated as protective claims for refund "to protect against the expiration of the statute of limitations," pursuant to section 6902. 9/18/95.

465.0215 **Six-Month Limitation.** Assuming the three year statute of limitation provided for in Section 6902 has passed, a claim for alleged over payment made in response to a Notice of Determination issued pursuant to the sales and use tax law must be filed within six months of the date the determination became final, or within six months of the date of overpayment, whichever is later, in order to be valid. If the amount alleged to be overpaid involves partial payments, a claim for refund of each partial payment must be made within six months of the date it was made. These limitations apply regardless of whether payments were made voluntarily or involuntarily. 2/1/91.

(Note changes in limitations for involuntary collection as a result of section 6902.3, in effect January 1, 1997.) (Am. 2000–2).

465.0216 **Statute of Limitations—Mobile Homes.** The statute of limitations begins to run for the purposes of making refunds with respect to sales tax or use tax on the sales of mobile homes as follows:

(1) When sold by a dealer registered with the Department of Motor Vehicles (DMV) the statute of limitations commences to run with the due date of the return of the dealer. For example, a mobile home is sold on September 29, 1976. Tax for the third quarter of 1976 is due and payable October 31, 1976. Accordingly, a claim for refund would have to be filed on or before October 31, 1979, in order to be timely. Since this is a sales tax transaction, the refund claim would have to be filed by the retailer and the amount refunded paid by him/her to the customer.

(2) An individual sells a mobile home on September 29, 1976, to another individual. The transaction is subject to use tax and payable by the purchaser to DMV at the time the application for change of registration is filed with DMV. The mobile home is required to be registered within twenty days after date of sale, but DMV automatically allows an additional ten days before applying penalties. Accordingly, when timely application for transfer of registration is filed with DMV, the liability incurred in September 1976, and, accordingly, the claim for refund should be filed not later than October 31, 1979.

If the purchaser made a late application for transfer of registration to DMV and paid the tax to DMV, then the claim for refund should be filed on or before October 31, 1979, unless extended beyond that date by reason of the six month extension for determination or payment.

If the purchaser made the application to DMV and the Board billed the purchaser for use tax, the Board would send the taxpayer a return showing the due date of the return as the last day of the month following the month in which the return is mailed, if that is within one year from the date of purchase. If the return is not filed, then a determination may be issued. Under these circumstances, the

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Board has set a period for the taxpayer which begins on the last day of the month following the mailing of the return and the claim for refund should be filed on or before three years from that date.

(3) If the Board learns of a person who buys a mobile home and does not pay use tax to DMV or the Board and more than one year has elapsed from the date of purchase, the Board treats the purchaser as being on an annual basis and bills him/her for tax, interest, and penalty as though the return was due on or before the last day of the month following the close of the year (counting the month of purchase as the first twelve months) in which the purchase was made. Accordingly, the taxpayer would have until and including October 31, 1980, to file a claim for refund on the mobile home purchased on September 29, 1976. 1/7/80.

465.0217 **Timeliness.** A taxpayer filed a claim for refund on May 1, 1992, for the period January 1, 1987, through June 30, 1989, with respect to purchases it made from a supplier. In August 1992, the Board's staff acknowledged having received the taxpayer's claim. In September 1994, the Board's staff advised the taxpayer that the Board was not accepting the claim as valid since the taxpayer was not the proper party to file the claim. The supplier or seller was the proper party since it paid the sales tax to the state.

Although it is unfortunate that there was a delay of over two years in notifying the taxpayer that the claim was not being accepted, it does not appear that any rights were impaired due to that delay. Even if the taxpayer had been advised immediately that it was not the proper party to file the claim, it would have already been too late for the seller to file a claim for refund. The statute of limitation period under section 6902 had passed for all periods except the second quarter 1989. Also, the alleged overpayments were all made for periods prior to the second quarter of 1989. Under the facts, it was already too late for the seller to file a claim for refund for any of the taxes at issue. Therefore, the taxpayer cannot be regarded as being harmed by the Board's delay and no ''equitable'' concerns need be considered. 3/23/95.

465.0218 **Claim For Refund—Timeliness.** Where an audit liability beyond the three year statute of limitation is paid in four installments made over a period of five months, and the taxpayer subsequently obtains information which makes him/her believe some of the liability was not due, he/she must file a claim for refund for each payment made and the claims must be filed within six months of the date of the payment to which it pertains. 10/29/90.

465.0219 **Unclaimed Refund Checks.** The legislature declared that Senate Bill 263 (Stats. 1993, Ch. 1060, section 4(d)) constitutes the sole remedies for refund or reimbursement of district taxes which were declared unconstitutional. Thus, when a refund check is returned unclaimed, the Unclaimed Funds statutes must be followed regarding safeguarding the check and any requirements regarding further attempts to contact the claimant. However, when the refunds and reimbursement period ends, they must be redeposited into the Senate Bill 263 impound account and transferred to the county.

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Because the Senate Bill 263 directs what must be done with any money remaining in the impound account, this provision operates as a statute of limitation in lieu of the provision of the Unclaimed Fund Laws. All of the money not refunded or reimbursed belongs to the county as of that date. Unclaimed refunds do not need to be separately accounted for because the claimant's rights are extinguished. 6/9/95.

465.0350 **Refund of Security.** Security posted to insure payment of taxes was applied to pay taxes. Some of the taxes to which the security was applied were over three years past due at the time the business closed. The security was applied on March 4, 1985, but was effective May 31, 1983, the date the taxpayer's permit was closed out. On March 25, 1985, the taxpayer filed a claim for refund for the taxes which were paid by application of the security. For purposes of determining the statute of limitation, the date of the actual application of the security governs rather that the effective date of the payment. Since the claim was filed within six months from the date of application, the claim is timely. 6/25/85.

(c) NOTICE OF DETERMINATION

465.0470 **Authority to Sign Waiver of Limitation.** If a taxpayer's employee who has apparent authority to sign a waiver of limitations signs the waiver, but does not have actual authority to sign the waiver, the waiver is nevertheless valid if the Board in good faith relied on the employee's ostensible authority to its detriment. 8/4/94.

465.0530 **Board Asserted Increases.** There is no formal requirement for the Board to assert an increase to a notice of determination. The Board may first assert an increase at a hearing in any manner which will notify the taxpayer, including an oral announcement. 1/7/93.

465.0545 **Claim For Increase in Determination.** As the result of a preliminary hearing following the filing of a timely petition protesting the findings of an audit, the staff counsel ordered that a reaudit be made to give effect to certain additional evidence presented by the taxpayer. During the reaudit, the auditor found grounds for asserting additional tax. The reaudit report was dated July 13, and pursuant to section 6563, the Board asserted a claim for increase in a letter dated July 23. However, on July 17 the Board received from petitioner payment in full of the amount of the original determination, together with a notice the petition was withdrawn. By letter dated August 3, petitioner contested the Board's authority to seek the additional amount disclosed by the reaudit because the petition had been withdrawn before a claim for increase had been issued and this action closed the matter.

The only constraint on the assertion of an increase in a determination is that it be issued before the determination becomes final and that it be asserted at or before a Board hearing and before the limitation period of section 6563 expires. These requirements were met. The petitioner's unilateral action does not close the matter. Once a petition for redetermination has been filed, the determination is held in abeyance pending some further action by the Board. That action is a

redetermination. The withdrawal of the petition merely permits the Board to redetermine without further review. It does not itself cause a redetermination or require the Board to redetermine immediately. 2/14/85.

465.0560 **Determination Mailed to Incorrect Address.** The application for seller's permit in the taxpayer's file dated May 6, 1985 shows that the taxpayer's home address as XXX Curtis, which was the correct address. However, an audit report dated September 12, 1986 identifies the taxpayer's new mailing address as XXX Citrus, and on February 5, 1987, the Board mailed the Notice of Determination to the Citrus address.

On October 1997, the taxpayer claimed that it only recently discovered that a determination had been issued. Since there was no evidence that the taxpayer was responsible for the incorrect address on the determination, and there is no evidence that the mailed determination was actually received by the taxpayer, the Board cannot establish that it gave written notice of its determination to the taxpayer as required by section 6486. As such, the audit liability was cancelled. 12/1/97. (M99–1).

465.0575 **Exemption Certificates—After Expiration of Statute.** The sale of property to a watercraft operator who had not submitted an exemption certificate was disallowed in the audit of the vendor. At the time of sale the purchaser held a permit and filed sales and use tax returns, but closed out the next year. The vendor filed a timely petition and succeeded in obtaining an exemption certificate from the buyer, resulting in the elimination of the transaction from the amount determined. The original sale occurred in 1968, and the certificate was accepted in March, 1972, after the statute of limitations had run on the period in which the sale and use of the property had been made. A subsequent audit of the buyer disclosed that the purchase was in fact taxable and the certificate should not have been issued. The Board has no recourse against the buyer for tax on this transaction since the late acceptance of an exemption certificate does not extend the statute of limitations, and the period of taxability had expired before it became known that the sale was taxable. 12/26/72.

465.0592 **Innocent Spouse.** A liability established as the result of filing nonremittance returns is not subject to the relief provisions of section 6456. Section 6456 is applicable only when a spouse established "that he or she did not know of, and had no reason to know of, that understatement . . . " Since there was no "understatement" of tax as defined in section 6456(a)(2), the spouse is not eligible for relief. 2/26/96.

465.0600 **Joint Venture Returns.** Several construction contractors formed a joint venture for the purpose of performing a construction project. The joint venture applied for and received a seller's permit. Returns were filed. The contractors later formed other joint ventures for performing other construction projects. The later joint ventures continued to file returns under the permit number of the first joint venture. The Board audited the later joint ventures and found deficiencies. The later joint ventures were regarded as having failed to file

returns, thus the eight-year statute of limitations applied. The returns filed under the permit were not returns filed by the later joint ventures. 11/5/93.

465.0825 **Limitation for Issuing Determination—Bankruptcy.** A taxpayer filed Chapter 11 bankruptcy on January 31, 1992. The Board initiated an audit which resulted in a Notice of Determination issued to the taxpayer on April 30, 1992, for pre-petition periods. With each of the tax returns filed by the taxpayer for the first quarter of 1992 through the third quarter 1993, the taxpayer attached a letter requesting that, ''pursuant to section 505(b) of the Bankruptcy Code, a determination as to any unpaid liability that the estate may have pertaining to this return be made as soon as possible.''

Although section 505(b) states that a ''request'' is to be made by a ''trustee,'' *In re Goldblatt* (1989) Bankruptcy Reporter 522, has held that either the debtor-in-possession or the trustee may invoke the section 505(b) procedure. Therefore, the time limitations specified in the code section are applicable for the Board's ''notification'' to the taxpayer of any additional tax due for those periods for which the taxpayer submitted its ''request'' pursuant to section 505(b), unless such return is fraudulent or contains a material misrepresentation (e.g., if the Board, within 60 days, notifies the estate that an audit is pending, it has 180 days to complete the examination or such additional time as the court may allow).

The general time limitation stated in section 505(b) has passed. While the Board may audit the taxpayer for those periods, it may issue a determination only if the Board finds that a return is fraudulent, or contains a material misrepresentation. 7/31/95.

465.0827 **Limitation Period.** A determination was issued on December 28, 1978 for the period of October 1, 1975 to March 31, 1977. The determination was not petitioned and became final. As a result of further examination, it was found that the taxpayer owed additional tax for the fourth quarter in 1975, which was beyond the statute of limitations. Also, the taxpayer was entitled to credits in the first and second quarters in 1976 which were within the statutes of limitations. The net result was an increase in tax due.

Section 6902(a) contains limitation provisions specifically applicable to determinations which allow debit and credit adjustments within the entire period covered by a determination as long as such a claim is filed within six months of the date the determination becomes final. However, such adjustments are subject to section 6563 which states that the Board may decrease or increase the determination before it becomes final. Since the determination was final, no net increase was possible. However, the tax increase (debit) in the fourth quarter of 1975 may be offset against the tax decrease (credits) in the first and second quarters of 1976, up to the amount of credits, thereby resulting in an unchanged determination. 6/26/79.

465.0830 **Limitation Period—Withdrawn Partner.** When the Board conducts an audit of a partnership and discovers that a general partner has previously withdrawn, the audit of the partnership is controlled by the limitation period specified in section 6487 (three years). If a determination is issued against the

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partnership, the withdrawn partner is secondarily liable for the partnership liability accruing after his or her departure only for the audit periods controlled by section 6487.2 (four years). The withdrawing partner will be liable for any taxes due from the partnership while he or she was a partner plus the partnership liability for periods specified in section 6487.2. 2/3/95.

465.0831 **Limitation Period—Withdrawn Partner.** Section 6487.2 may not be utilized to issue a determination against a partner who has withdrawn from a partnership for audit periods for which the partnership itself cannot be held liable unless, of course, the withdrawn partner (and not the partnership) was the ''seller'' for those audit periods. If the withdrawing partner is the ''seller'', section 6487 is applicable. 2/3/95.

465.1000 **Person Authorized to Sign Waiver of Limitation.** If a corporation wishes to avoid the necessity for an officer to sign a waiver of limitation, it may issue a power of attorney authorizing another person or persons to sign a waiver. The auditor can then copy the power of attorney and accept the signature of an authorized person on the waiver. 11/28/94.

465.1500 **Shortened Statute of Limitation—Section 6487.05.** A retailer located out of state ships all property from its out-of-state location directly to customers by common carrier. The retailer has maintained a sales office in California for several years. The retailer was not familiar with the California Sales and Use Tax Law and included an indemnification clause in its contracts that the buyer is responsible for any sales or use tax. For this reason, it has not obtained a California seller's permit.

The taxpayer's inquiry relates only to the first requirement of section 6487.05, that the retailer be located outside this state. The provisions of section 6487.05 are intended to apply to retailers whose only liability was for failing to collect and remit use tax to the Board. Under these circumstances, if the retailer's only liability is incurred under sections 6203 (collection of use tax) and 6204 (use tax required to be collected is a debt of the retailer), the retailer is regarded as located outside the state even though it has a sales office in California. Therefore, if all sales made by the out-of-state retailer to California customers occur outside California, and the retailer does not owe any sales tax, the retailer is regarded as located outside this state for purposes of section 6487.05. However, if the retailer incurs any sales tax liability, the Board will not regard it as located outside this state for purposes of section 6487.05, and the retailer will not qualify for the shortened statute of limitations period provided by that provision. 3/21/95.

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465.1542 **Statute of Limitation.** When a person has conducted business using the seller's permit of a predecessor in the business, the returns should be regarded as returns filed by the actual seller. Therefore, any audit of the actual seller should be limited to the three-year statute of limitations of section 6487 and the penalty for failure to file returns does not apply. 3/10/82.

465.1543 **Statute of Limitations.** A taxpayer underpays the taxes due for one or more periods. Subsequently, the taxpayer discovers the error and corrects it by overpaying the tax due in following periods. An audit is performed, but the statutory limitation periods include the period of overpayment, but not the period of under payment. The taxpayer wishes to offset the overpayments against deficiencies noted in the periods under audit.

No offset is permissible. When a limitation period prevents collection activities by a creditor, it does not prevent a debtor from making payments against an overdue but acknowledged debt. Where an overpayment in one period is clearly payment for an amount due in an earlier period which has become barred by the statute of limitations, the overpayment may be properly applied to the underpayment for such periods. There is no requirement that such payments be applied to underpayments for subsequent periods under audit. 8/5/94.

465.1544 **Statute of Limitations.** The Board issued a Notice of Determination against a taxpayer as a partnership. The taxpayer filed a timely petition and the case proceeded to an Appeals Conference. The Appeals Section recommended denial of the petition, the taxpayer requested a Board hearing, and the Board's staff then discovered that the partnership had, in fact, incorporated on September 2, 1988, which was prior to the period covered by the Notice of Determination. The question now arises whether the three-year or eight-year statute of limitations applies to issuing a determination against the corporation.

When an entity operates a business using the seller's permit of a predecessor, the returns should be regarded as filed by the actual seller. Thus, a three-year statute of limitations applies for the period of operation of the corporation. The Notice of Determination issued in the names of the partnership is not notice of liability owed by the corporation. 12/19/96.

465.1547 **Statute of Limitation—Section 6487.05.** Section 6487.05 limits the statute of limitation to three years with respect to certain out-of-state retailers who would otherwise be subject to the eight year statute-of-limitations. Under subsection (a) of section 6487.05, a "qualifying retailer" is a retailer that meets all of the five conditions set forth in the statute. In order to meet the requirements of conditions (3) and (4) of section 6487.05, a retailer must voluntarily register with the Board without having been contacted by the Board or its agents regarding the provisions of section 6203 and the out-of-state retailer must register with the Board after January 1, 1995, the effective date of section 6487.05.

Thus, retailers that registered before January 1, 1995 do not come within the protection of section 6487.05 and the eight year limitation period specified in section 6487 applies to such out-of-state retailers who had not filed returns. 3/16/96.

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465.1548 **Statute of Limitations.** Section 6563 does not bar the issuance of a new determination for a period otherwise open under the statute of limitations. The purpose of section 6563 is to permit an increase in a determination, notwithstanding the fact that the statute of limitations may otherwise have run. It is not a limitation on the limitations period. Effectively, it expands the limitation period to the extent that the Board has otherwise acted within the limitations period. 10/25/91.

465.1549 **Statute of Limitations.** An opinion was requested as to the proper application of the statute of limitations where a taxpayer with no permit files a return covering specific periods.

The language in the first sentence of section 6487 supports the position that, at any time within a three year period following the filing of a return, additional tax may be asserted for the period covered by the return. Applied literally, this could mean that if a return is filed covering a ten year period during which no returns were filed, the Board could wait three years and then issue a determination covering thirteen years. In the same situation, if the taxpayer did not file a return, the determination could only go back eight years. It is noted that section 6487 was amended in 1951 to add the eight-year limitation period in cases of failure to file a return. It is not believed that the thrust of the amendment to limit the period to eight years can be avoided by a taxpayer filing a return which is then used as the basis for keeping the early periods open for an additional three years. 11/21/73.

465.1550 **Statutory Period—Unpermitized Division.** The definition of ''person'' in section 6005 includes a corporation, but does not include unincorporated divisions, which are nothing more than internal sub-units not having a separate legal life. A corporation having some divisions holding permits and filing returns, and one division which is neither, is considered to be a ''person'' that has filed a return for those periods for which returns were filed, since each person is only required to file one timely return per period. The statute of limitations for the issuance of a deficiency determination for any liability of the unpermitized division is three years in the absence of conclusive evidence that the taxpayer's failure to report the liability of this unit was due to fraud or intent to evade the law. The eight year limitation period applies only if a ''person'' fails to file a return. 1/29/69.

465.1600 **Time for Payment of Use Tax.** Pursuant to a contract, a chemical company agrees to sell to an oil company all of its needs for a particular consumable chemical for a period of ten years at a fixed contract price. The parties agreed that, during the first four years, the buyer would be billed for only a portion of the product delivered. The remainder, which was for product delivered and not billed, would be billed on a deferred basis to be paid over the remaining contract period. They also agreed that upon the happening of a certain contingency the price may be adjusted downward.

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The time for reporting the use tax is at the end of the quarterly period in which the sale and purchase occurred irrespective of the billing procedure agreed to in the contract. The measure of tax is the contracted price until such time as the contingency becomes a reality and the price is actually reduced. 11/10/71.

465.1900 **Validity of Waiver of Limitation.** An auditor who originally spoke to the taxpayer was referred to the taxpayer's accountant. Later, when the auditor presented the waiver of limitation document to the accountant, he asked the accountant whether or not the accountant had the authority (i.e., a power of attorney) to sign the waiver on the taxpayer's behalf. The accountant indicated that he did. The waiver of limitation document states, in part, that ''Signatory if not a corporate officer, partner, or owner certifies under penalty of perjury that he holds a power of attorney to execute this document.'' In addition to the above certification on the waiver form, the accountant signs the taxpayer's monthly sales and use tax returns as ''taxpayer's controller.'' Furthermore, in the taxpayer's correspondence with the Board concerning a problem on a sales and use tax return, the letter was signed by the accountant as ''C.P.A. Controller.''

Under the facts described, the taxpayer is now estopped from denying the authority of the accountant to sign the waiver of limitation form. If a third person reasonably believes an agent to possess the power to bind his principal and the agent has been held out to the third person by the principal as empowered to transact the principal's business, the principal cannot later claim the authority was not conferred against the third parties affected thereby. In this instance, the accountant as taxpayer's agent was held out as person who had authority to deal with the Board regarding the audit. Additionally, he has consistently been held out as a corporate officer (the controller). Finally, the waiver form was signed after the accountant indicated he had the authority to do so. 4/5/83.

465.2450 **Waiver Absence of Permit Number.** The absence of the taxpayer's permit number on a signed waiver of limitation does not invalidate the waiver if the taxpayer has only one permit. Also, the fact that the waiver form was filled out by a Board auditor is immaterial. 12/13/94.

465.2600 **Waiver of Limitations.** A Board auditor requested a taxpayer to sign a waiver for certain periods the auditor intended to review. On August 14, 1990, the taxpayer signed a waiver extending the period limitations for the last two quarters of 1987 and all quarters of 1988 through April 30, 1992. The waiver was forwarded to the Board which received it on August 17, 1990. In August 1991, a different auditor signed the waiver and sent a copy to the taxpayer. The taxpayer contends that the waiver is not valid because it was not signed by a Board representative until after the expiration of the statute of limitations or, alternatively, because it was not signed within a reasonable amount of time after submission to the Board.

If a taxpayer executes and sends a waiver to the Board prior to the expiration of the period of limitations pursuant to the Board's request to do so, the taxpayer has ''consented'' within the meaning of section 6488. The waiver in this case is valid because it was executed by the taxpayer pursuant to the Board's request and received by the Board prior to the expiration of the period of limitation. 2/20/92.

RENTALS
See Leases of Tangible Personal Property—In General; Leases of Mobile Transportation Equipment.

REORGANIZATIONS
See Occasional Sales—Sale of a Business—Business Reorganization.

470.0000 REPAINTING AND REFINISHING—Regulation 1551
See also Manufacturers of Personal Property.

470.0010 **Materials Used in Painting Automobiles.** An automotive paint shop may purchase the paint, solder, and welding rods for resale since they become component parts of the automobile. If putty used in the painting operation remains as a component part of the automobile, it may also be purchased for resale.

Paint thinner, abrasives, cleaning compounds, and masking tape are regarded as consumed by the paint shop as they do not remain on the automobile as component parts thereof. Accordingly, sales of these materials to automotive paint shops are taxable. 7/25/50.

470.0020 **Signs.** Repainting signs without changing copy is a repair operation. 1/24/51.

470.0040 **Signs.** Repainting removable sign because of change in copy constitutes taxable processing, as sign becomes essentially new. 8/29/51.

470.0060 **Signs.** Charges for completely repainting sign and changing lettering are taxable as fabrication unless work is done on sign while affixed to land or building. 9/23/52.

470.0080 **Signs.** A sign painter who merely changes or blacks out lettering on signs which are not attached to realty, is regarded as performing a reconditioning operation and is the consumer of paint which he uses. Where the painter makes extensive changes to the sign, i.e., he changes the entire design, makes lettering larger or smaller or rearranges it so that a completely different sign is created, such operation is considered to be fabrication and the painter's entire charge therefore is taxable. 3/16/67.

470.0100 **Signs.** The sign painter is regarded as the consumer of paint used in repainting signs not attached to realty, regardless of whether or not the lettering is changed or blacked out. 7/17/58.

470.0120 **Used Vehicles for Resale.** A custom painter of automobiles may give a resale certificate when purchasing paint to be used on cars being painted for used car dealers, and accept a resale certificate from the car dealer for the paint used in refinishing such cars. A dealer in used cars who has his own paint shop may give resale certificate for paint purchased and used in rehabilitating his used cars. Both purchases of paint are for resale and tax does not apply. 9/19/51.

REPAIRERS AND RECONDITIONERS
See Installing, Repairing and Reconditioning in General; Miscellaneous Repair Operations.

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REPLACEMENTS
See Returns, Defects and Replacements.

472.0000 REPORTING METHODS FOR GROCERS—Regulation 1602.5
See also Food Products.

REPOSSESSIONS
See Credit Sales and Repossessions.

REPRODUCTION PROOFS
See Printing and Related Arts.

REPRODUCTION RIGHTS
See Gross Receipts.

475.0000 RESALE CERTIFICATES—Regulation 1668
See also Demonstration, Display and Accommodation Loans of Property Held for Resale.

475.0003 **Acceptance of a Resale Certificate.** A retailer has a policy that limits sales of a particular item to no more than three per customer. Some individuals or businesses bypass the three-item limit by having multiple individuals purchase three items each. The retailer reports and pays sales tax on the sales, and collects sales tax reimbursement from the customers. The individuals or businesses in question subsequently consolidate all the register receipts and submit them along with a resale certificate to the retailer for a refund of the sales tax reimbursement paid. The retailer has properly treated these transactions as retail sales subject to tax and is not required to accept the resale certificate as a result of the subsequent events. If otherwise appropriate, the purchaser may take a tax-paid purchase resold deduction on subsequent sales of the items. 11/17/97. (M99–1).

475.0005 **Acceptance Prior to Change in Regulation.** A resale certificate was issued and accepted in good faith prior to the June 17, 1989, amendment to Regulation 1521(c)(3). The certificate is not invalidated as to contracts completed before that date merely because the amendment was not designated as being of prospective effect only. The Board's reclassification of portable buildings resting in place by their own weight from personal property to improvements to realty cannot create a liability that was extinguished by a resale certificate which was taken in good faith at the time of the sale and prior to the change in the regulation. 4/16/92.

475.0008 **Art Purchased by a Nondealer.** A corporation is engaged in the sales of building material. Its president, a former art student, commenced purchasing early California art for the corporation's account. Artwork purchases were made ex-tax under resale certificates. It was the president's intention to dispose of the existing corporate operation in two or three years and to establish an art gallery featuring early California art as a form of retirement activity. While the president had previously acquired artwork for himself and paid tax thereon, he considered the ex-tax purchases to be true purchases for resale because of his expressed intention to use the corporation to enter the art gallery field at some time in the future. This intention was duly recognized in the minutes of the Board of

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Directors. The president's practice was to purchase slightly damaged or soiled paintings at bargain prices and to have them restored and cleaned, after which they were stored usually at the president's residence.

More than three years has passed since the first ex-tax purchases of art were made and none of the paintings have been sold. Nor was there a gallery location. Under these circumstances, it was concluded that the ex-tax purchases of art were not purchases for resale because the corporation was not engaged in the business of selling art at the time that it made these purchases. Persons purporting to hold property for resale must be able to prove that they actively engage in business as a seller of such property and have relevant evidence showing such activity. Such evidence includes the number, scope, and character of the person's purchases and sales, evidence of the person's effort to advertise and hold himself out to the public as being engaged in the business as a seller, and the acquisition of necessary local business licenses, etc. 6/16/80.

475.0011 **Automobile Collector.** It is improper to issue a resale certificate for the purchase of an automobile when the retailer/dealer knows at the time of purchase that the vehicle is to be loaned to a museum for display. The property is being purchased for a personal collection and not for resale. 1/28/93.

475.0020 **Burden of Proof.** Where a seller does not have a resale certificate on file he may show by other evidence that the property was resold in the purchaser's regular course of business. This is true even though the purchaser does not have a seller's permit if he has made sufficient sales to be required to hold a seller's permit. 10/6/65.

475.0022 **Carrier Furnished by Purchaser—Leased Rail Cars.** A California taxpayer is selling asphalt to a customer based in Utah. The customer has a valid seller's permit for Utah which is on file in the taxpayer's office. The purchaser does not have a customer base in California and intends to resell the asphalt in Utah. A letter to that effect is also on file in the taxpayer's office. The transportation of the asphalt was arranged by the Utah customer through the leasing of rail cars. The product is loaded into the rail cars leased by the customer at the refinery located in California. Ownership of the product becomes the customer's at that time.

The property is not delivered to a carrier hired by the purchaser but is instead delivered into rail cars leased by the purchaser, that is, the property is delivered to the purchaser. That delivery takes place in this state. Therefore, the sale does not qualify for the interstate commerce exemption under Regulation 1620.

However, if the purchaser intends to resell the asphalt, the California retailer may accept a valid resale certificate from a purchaser for property delivered in California which is purchased for resale out of state. The certificate must contain the elements required by Regulation 1668(b). If the purchaser does not have a California seller's permit number, the out-of-state permit number must be noted on the certificate. 7/21/95.

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475.0025 **Consigned Merchandise.** There is no legal requirement that consignees provide resale certificates to consignors of property. However, in situations where a consignor has purchased items for resale without the payment of tax, a resale certificate given by consignees will ensure that the consignor will not be held liable for tax in consigning the property. Since consignees are not purchasing the property, they may modify the language used in the resale certificate changing the word ''purchase'' to ''taken on consignment'' and issue this modified certificate to consignors who may be reluctant to consign merchandise without an accompanying exemption certificate. 5/4/93.

475.0025.100 **Construction Contractor—Issuing Resale Certificate.** A construction contractor may issue a resale certificate to its suppliers when purchasing materials as a fungible, commingled lot, a significant portion of which the contractor intends to resell and a portion of which the contractor will consume, when at the time of purchase the contractor does not know which item will be consumed and which will be resold. For example, materials are all placed in a resale inventory and removed for sale or use as needed. However, if at the time of purchase the contractor knows that certain materials will be consumed in the performance of a construction contract, the contractor may not issue a resale certificate with respect to the materials. The sale to the contractor of such materials is subject to the tax. 8/15/94.

475.0026.800 **Deletion of Tax by Purchaser.** A purchaser issues a blanket resale certificate to a vendor. A subsequent purchase order marked ''taxable'' is issued to the vendor. Upon receipt of the invoice, the purchaser crosses out the tax reimbursement and returns the invoice to the vendor with a notation that the purchase is for resale. The blanket resale certificate the purchaser issues to the vendor coupled with the ''for resale'' notation on the returned sales invoice relieves the vendor from liability for sale tax on the transaction. The purchaser is regarded as purchasing the property under a resale certificate. 12/5/89.

475.0026.875 **Delivery in State to Out-of-State Retailers.** An Oregon lumber wholesaler purchases lumber from a California mill, and sells it to an Arizona customer, FOB mill. The Arizona manufacturer has a common carrier pick up the lumber with title passing at the mill. The Arizona customer does not have a California seller's permit, and alleges it does not need one since it makes no retail sales in California.

Under the facts recited, the sale does not qualify as a sale in interstate commerce because there is no contractual requirement between the wholesaler and its customer that the property be shipped to a point out of state. This sale would qualify if the contract required that the lumber be shipped out of state by common carrier, even though the carrier was engaged by the customer.

With respect to the need for a seller's permit, the Arizona customer would need one if it makes any sales in California, even if none of them are at retail. However, if the customer is purchasing the lumber for resale at an out-of-state location, it may issue a valid resale certificate specifying that a permit is not required because no sales are made in California. If such a certificate can be taken

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in good faith by the seller/wholesaler, the sale is not subject to sales tax, even if the property was picked up at the mill by the customer. 3/15/89.

475.0026.900 **Delivery of Vehicle for Out-of-State Dealer.** An out-of-state new car dealer (not engaged in business in California) sold a vehicle to a company in California for delivery to a winner of a raffle held by the company. The out-of-state dealer ordered the vehicle from the factory which delivered it to California Dealer A for redelivery to the winner of the raffle. Dealer A was instructed by the company to collect the California sales tax and license fees from the winner.

However, the winner did not want to take delivery of the vehicle. Instead, the winner asked Dealer A to transport the vehicle to Dealer B located in another town. The winner then took delivery of a different vehicle and paid the cost difference to Dealer B. Dealer B collected ''sales tax'' and license fees on the replacement vehicle and offered the original raffle prize vehicle for sale.

This transaction falls within the provisions of the second paragraph of section 6007. Dealer A is considered the retailer of the vehicle it delivered and it owes sales tax on that sale. Dealer A may collect sales tax reimbursement if the contract so provides. The company who purchased the vehicle may be able to obtain payment from the winner for taxes it pays as a result of its contract and rules of the raffle. In any case, the Board will look to Dealer A for payment of the sales tax on the transaction.

Dealer A does not make a sales for resale to Dealer B. The winner's purchase of a more expensive vehicle is nothing more than a car purchased with a trade-in. Dealer B will be obligated to pay sales tax on the sale of the replacement vehicle. 9/23/96.

475.0027 **Description of Property to Be Purchased.** A resale certificate issued to a seller of electrical supplies which describes the property to be purchased as ''electrical equipment or supplies'' and ''electrical supplies'' was intended to have a broad meaning and includes all electrical items purchased from the vendor including ''materials'' and ''fixtures'' as these terms are defined under Regulation 1521. 4/20/88.

475.0028 **Drop Shipments.** A taxpayer makes sales to an out-of-state corporation which is not engaged in business in California. The out-of-state customer directs that goods be drop shipped to California entities. The taxpayer is deemed the retailer under section 6007 unless the California customer is purchasing the property for resale. The taxpayer is not relieved of liability for tax by its acceptance of a resale certificate from the out-of-state retailer that lacks a valid California seller's permit number. The taxpayer will be relieved of liability for tax, however, if it accepts a timely valid resale certificate in good faith from the California customer of the out-of-state retailer. 12/14/93.

475.0035 **Erroneous Information on Certificate.** A purchaser issued a resale certificate which contained what appeared to be legitimate entry in each part of the certificate and which certificate was accepted in good faith by the seller. The

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purchaser cannot use as a defense that the resale certificate is defective because it contained incorrect information to relieve him of the responsibility to pay use tax if the property is not resold. 1/25/91.

475.0037 **Essential Elements of Resale Certificate.** An out-of-state retailer sold equipment to a California consumer. Three and a half months later, a leasing company notified the out-of-state retailer that it had purchased the equipment that the out-of-state retailer had sold to the California consumer as part of a leaseback transaction. The leasing company issued an exemption certificate which stated the property was purchased from the out-of-state retailer ''exclusively for the purpose of leasing.''

The exemption certificate is not a valid resale certificate because it was not issued by the party who purchased the equipment. Further, the certificate was not issued timely and did not indicate that the property was purchased for resale. 9/29/88.

475.0038 **Essential Elements of Resale Certificate.** An out-of-state lessor purchases equipment from an out-of-state retailer for shipment to Corporation A, a California consumer. Corporation A issues a document to the out-of-state retailer that states ''Corporation A is engaged in a sale and leaseback program and is exempt from California sales tax on specified equipment. California Exemption (sales tax permit number shown).''

Since the property is sold to the lessor, not the lessee, the document is not issued by the purchaser of equipment, the lessor. Also, the document does not satisfy all of the five essential elements of a valid resale certificate set forth in Regulation 1668. It is not acceptable as a resale certificate. The retailer bears the burden to establish that the property was resold. 9/29/88.

475.0039 **Exemption and Resale Certificates.** Construction contractors are sellers of fixtures and may purchase fixtures for resale regardless of whether the contractor intends to install the fixtures or to resell them to another contractor for installation by the other contractor.

Construction contractors are consumers of construction materials which they furnish and install. Contractors may issue resale certificates when purchasing materials only when they will actually resell a significant portion of them and at the time of purchase they do not know which items will be consumed and which will be resold.

Sales of construction materials intended to be used on out-of-state construction projects may be purchased under a timely exemption certificate pursuant to section 6386 by a holder of a seller's permit. A resale certificate should not be issued in this situation because the materials will not actually be resold. 7/5/94.

475.0040 **Fabrication Labor.** Resale Certificates given for fabrication labor performed on customer furnished material should be treated the same as resale certificates given for tangible personal property purchased for resale. Accordingly, if the material upon which the fabrication labor is performed is used

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for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business, such use is taxable. 12/18/56.

475.0045 **False Information on Certificate—Use Tax Liability.** A resale certificate, regular on its face, taken in good faith from the buyer by the seller, which later proves to have false information regarding one or more of the five required elements described in Regulation 1668(b), relieves the seller from liability from the sales tax. The purchaser is liable for use tax on the theory that the property was purchased under a resale certificate. A dual determination should not be issued to the seller. 9/24/86.

475.0050 **Fax-Facsimile Transmissions.** A FAX transmission contains sufficient indication of authenticity, e.g., telephone number of sender, date and time of transmission—to be acceptable in place of the original document. In recognition of current business practice as modified by advances in technology, faxed copies of resale certificates provided in support of nontaxable sales for resale will be administratively accepted. A faxed resale certificate will be considered valid only if the certificate contains the information required by Regulation 1668. The faxed resale certificate must also contain, either on the document itself or on the standard cover sheet, the date and time of transmission and the telephone number of the sender. 12/10/90.

475.0055 **Federal Firearms License.** A federal firearms license does not qualify as a resale certificate even though this license, combined with a copy of a seller's permit, contains all the essential elements specified for a resale certificate. Regulation 1668 not only requires that the purchaser hold a seller's permit, but also that the writing, within the certificate, expressly recite that the purchase was ''for resale.'' Although the federal regulatory act requires the purchaser to be a ''dealer'', it cannot be implied that the property was in fact purchased for resale. 4/20/90.

475.0057 **Fungicide Removed During Manufacturing.** A firm applies a fungicide to lumber. It surfaces the lumber and, in the process, it removes all of the fungicide. The shavings from the surfacing process which contain the fungicide are sold. The primary purpose of the fungicide is to protect the lumber during the manufacturing process. The sale of the fungicide to the manufacturer is subject to tax even though the fungicide may remain in shavings which are sold. 5/8/97.

475.0058 **Gas Ranges—Sales By Builder of Apartment House.** Free standing gas ranges/ovens may be sold for resale to the builder of an apartment house who will resell the ranges and the apartment house upon completion. It is immaterial that the seller of the ranges may install them in the appropriate place within each apartment. The builder should issue a proper resale certificate in a timely manner, as prescribed in Regulation 1668. In the absence of a proper certificate, the sale would be presumed to be a retail sale pursuant to section 6091 of the Sales and Use Tax Law, unless other evidence is submitted to show that the item was resold.

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"Built-in" ranges and ovens, on the other hand, are either fixtures or materials and their sale and installation are governed by Regulation 1521. The regulation provides that the contractor who furnishes and installs such items is the consumer of materials and the retailer of fixtures. The installing contractor does not make a sale for resale and may not accept a resale certificate for such items. 8/23/60.

475.0060 **Gift Items.** An out-of-state supplier, with nexus in California, sells gift items such as TV's , VCR's, and sailboats to banks in California. The banks give the items away to depositors in lieu of interest.

A transfer of tangible personal property by the banks in lieu of a cash transfer of interest constitutes a retail sale of such property. The forfeiture of cash payments constitutes the consideration for the transfer of the property. 12/19/89.

475.0062 **Good Faith.** When a company sells property to a person who is in the business of reselling that type of property and who issues the company a resale certificate, the company would be regarded as accepting the certificate in good faith unless it had specific knowledge that the purchaser was not reselling the property. On the other hand, if the sale is to a person who is not in the business of selling that type of property, the company's good faith in accepting a certificate from that purchaser may be subject to some doubt. 6/24/91.

475.0065 **Good Faith Acceptance of Certificates.** Vendors are expected to exercise reasonable judgment with respect to accepting resale and exemption certificates in good faith. If the property sold is in the opinion of the vendor and from the vendor's experience of a type that would ordinarily be consumed or used in a nonexempt manner, the vendor's good faith acceptance of a certificate may be questioned. 5/23/75.

475.0069 **Holding Property For Appreciation In Value.** Paintings were purchased with the hope of realizing a profit by their eventual sale rather than with the intent of making them part of a permanent collection. The paintings were of doubtful origin and did not have currency in the market. The purchaser hoped to make them profitable and salable in the future by collecting attributions for them which would establish an increased value. Thus, the paintings could not be considered part of the purchaser's stock in trade held for resale in a regular course of a business. In arriving at this conclusion, it was noted that the purchaser never made three sales during any twelve-month period. In fact, no sales were made during this period. Thus, resales of paintings were not part of the regular course of business during the audit period.

Accordingly, it was concluded that the paintings were purchased for a purpose other than, or in addition to, a resale in the regular course of business. While there is nothing illegitimate in holding property with the hope that it increases in salable value, purchase of it does not qualify as a nontaxable purchase for resale. 4/18/69.

475.0073 **Improper Use of Resale Certificate.** A taxpayer is engaged in the business of oil exploration, an activity involving the use of a great variety of electronic equipment. The taxpayer gave a resale certificate for the purchase of

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such equipment and claimed exclusion from the use tax under section 6009.1 because of subsequent shipment and use of the property outside the state. The taxpayer defended the issuance of the certificate on the basis that at the time of purchase it was not known whether any particular item would be resold or used. However, since less than 2% of the purchases were resold, and even these sales were made to related foreign corporations, the argument is specious. The property could not realistically be said to have been purchased for ''resale in the regular course of business.'' Under these circumstances, the issuance of the resale certificate in an attempt to create a use tax exclusion under section 6009.1 is a misuse of the certificate. The purchases are subject to tax. 2/11/72.

475.0080 **Intent of Purchaser.** Where a firm purchases merchandise ex-tax under a resale certificate and then later gives the merchandise away, as, for example, Christmas gift, it is liable for the tax; however, a resale certificate may be validly given only if, at the time of purchase, there is no intent to use the property for such purposes. 1/20/61.

475.0100 **Intent of Purchase.** A jobber who wishes to purchase materials for his own consumption may not issue a resale certificate for such purchases. The provisions of Sections 6092 and 6094.5 are applicable, even though a manufacturer refuses to sell to a person except upon condition that he issue a resale certificate. 1/27/59.

475.0103 **Invalid Certificate.** The fact that a resale certificate was not timely and failed to show the buyer's seller's permit number does not necessarily make the transaction taxable. A valid certificate relieves the seller of the burden of proof that the sale was not at retail. An invalid certificate makes it necessary for the seller to provide specific evidence that the sale was not at retail. Failing to do so makes the sale taxable under the presumption in section 6091.

A seller negotiates a sale to a research facility who will resell the item to the U.S. Government, but the seller is instructed to invoice the sale and pass title to a finance company who issues a late and incomplete resale certificate to the seller. The sale to the finance company was a valid sale for resale since the finance company sold the item to the research facility without prior use and the finance company has sufficient documentation to show this. 7/25/88.

475.0105 **Invalid Permit Number.** A taxpayer began charging a customer sales tax when it learned that the permit number shown on its resale certificate was no longer valid. The customer is now requesting a refund from the taxpayer of the sales tax reimbursement charged.

A resale certificate operates to relieve the seller from liability for sales tax if taken: (1) in good faith, (2) from a person who is engaged in the business of selling tangible personal property, and (3) from a person who holds a valid seller's permit. If the taxpayer had been issued a resale certificate by a customer during the period the customer did not have a valid seller's permit, the buyer could not have issued a valid resale certificate. Therefore, any sales to it would be presumed to be at retail until established otherwise. There is no provision for curing a resale certificate issued during a period in which the purchaser did not

hold a valid seller's permit by back dating a seller's permit. However, if it could be proven to the satisfaction of the Board that the specific property was in fact resold by the purchaser and was not used by it, the taxpayer would be entitled to a refund of the taxes paid on those sales, provided that such amounts are returned to the customer. 2/21/95.

475.0112 **Liability For Sales Tax.** The failure to take a timely resale certificate for the sale of tangible personal property in California makes the seller liable for the payment of sales tax regardless of any written statements subsequently obtained from the buyer alleging his resale of the property without prior use or alleging his self-reporting and payment of the use tax on the purchase, if such statements are found to be false. The making of such statements does not make the buyer liable for use tax unless the applicable tax was use tax in the first place, and then the buyer would be liable regardless of whether or not such statements were made. 1/10/78. (Am. 2002–2).

475.0120 **Order Blank,** to constitute valid resale certificate, must contain all the elements of such certificate. 12/10/52.

475.0140 **Out-of-State Dealer Issuing.** A California dealer may properly accept a resale certificate from a Mexican dealer for a vehicle delivered to the Mexican dealer in California and driven by the Mexican dealer for no purpose other than to get the vehicle to the Mexican dealer's place of business for purposes of selling it. 5/10/65.

475.0159 **Out-of-State Use.** A person may not issue a resale certificate to purchase property in this state for the purpose of transporting the property outside the state and claiming the exclusion from ''use'' provided by section 6009.1. The exclusion contained in section 6009.1 applies only to transactions governed by the use tax. Purchases of items in California known at the time of purchase to be for use albeit out of state, under an improperly given resale certificate, are not covered by the exclusion. The exclusion does apply if at the time of purchase it is not known whether the property will be used or sold. 6/9/60.

475.0160 **Out-of-State Use.** Sales of materials delivered in California to an out-of-state construction contractor for his use are taxable where the latter has no valid California seller's permit, even though he may hold a seller's permit issued by another state. However, if the vendee is, in fact, a retailer as well as a construction contractor, a resale certificate may be accepted, provided the vendee is unable to tell at the time of the purchase whether the property will be consumed or resold. A resale certificate may not be accepted solely on the basis that the state in which the construction contract is to be performed treats construction contractors as retailers of materials. 1/24/61; 7/24/87.

475.0164 **Photographic Stock House.** A photographic stock house has images on loan from contributing photographers who grant the stock house permission to act as their agent in leasing their photographs for advertising and editorial usage. In some cases, the stock house does not have on file a photograph sought by its customer. The stock house will go to another stock house for the photographs and

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submit these photographs to the customer. If the customer leases the photograph, the stock house inquires as to how these transactions should be handled for sales and use tax purposes.

The stock house should issue a resale certificate to the other stock house. This latter stock house does not need to report, pay, or collect tax on the transaction. Rather, the stock house issuing the resale certificate should report and pay tax on the full charge made to the customer. Tax is due only at the retail level computed upon the retail price. 2/10/87.

475.0166 **Property Purchased From.** A resale certificate is valid even if the ''Property purchased from'' section shows the vendor's business' fictitious name. 4/20/88.

475.0168 **Property Purchased for Resale.** A sale is for resale only if the tangible personal property is purchased for the purpose of resale in the regular course of business without prior use. Property which, as a result of the nature of its use, incidentally becomes a component of another article which is resold should not be purchased for resale. For example, portions of certain chemicals used in the film developing process may adhere to the developed negative or print because the action of the wash or rinse is less than perfect. These chemicals do not become items purchased for resale simply because, after their intended use, some portion remains with the finished product. 1/31/72.

475.0168.165 **Purchase of Meals by Government Contractor.** As a result of the decision in *Aerospace* v. *State Board of Equalization* (1990 218 Cal.App.3d 1300), a government contract may treat indirect costs, such as overhead expenses, properly allocable to its government contracts as purchases for resale to the United States if the government contract involved contains appropriate title passage clauses. A restaurant may sell meals ex-tax to a government contractor if the contractor issues a valid and timely resale certificate which includes a statement that the specific property is being purchased for resale to the Federal government, pursuant to the contract and in the regular course of business. (Note: the sale must be to the contractor and not merely to employees of the contractor who receives expense reimbursement.) 11/15/93.

475.0168.180 **Purchase Order Supported by Blanket Resale Certificate.** A customer issued a purchase order to a printer for the purchase of brochures. The customer attached a resale certificate to the purchase order indicating that four-digit purchase order numbers should be considered nontaxable. In addition, the bottom-line tax portion of the purchase order read ''.00'' for sales tax amount to be charged.

Subdivision (b)(4) of Regulation 1668 provides that if a purchaser wishes to designate on each purchase order that the property is for resale, the seller should obtain a qualified resale certificate, i.e., one that states: See ''purchase order'' in the space provided for a description of the property to be purchased. Each purchase order must then specify whether the property covered by the purchase order is purchased for resale or whether tax applies to the orders. If the purchase

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order does not so specify, it will be assumed that the property covered by the purchase order was purchased for use and not for resale.

In this case, the purchase order did not specify whether the property covered by the purchase order was purchased for resale or whether tax applied to the order. Therefore, the sale is not covered by the resale certificate and is subject to tax unless the printer establishes that the purchaser resold the brochures along with its products. 7/11/96.

475.0168.190 **Purchaser's Liability for Sales Tax Reimbursement.** A purchaser owes the seller sales tax reimbursement for the seller's sales tax liability if their contract of sale so provides. When a purchaser issues a document intended to be a resale certificate in order to avoid paying sales tax reimbursement, it is clear that, but for that document, the seller would have collected reimbursement from the purchaser. Thus, when such a document is not a valid resale certificate and the seller is held liable for sale tax, the seller is entitled to collect reimbursement from the purchaser for that sales tax liability. In order to avoid having to pay the seller such reimbursement, the purchaser must provide the seller sufficient documentation that the purchaser resold the property without use, such that the seller can carry its burden with the Board of establishing that its sales were actually for resale. 5/16/97.

475.0168.200 **Purchases for Resale from a Section 6015 Retailer.** A section 6015 retailer cannot accept a resale certificate from its sales representatives. If a sales representative consumes rather than resells property purchased from a section 6015 retailer who is located outside the state and registered to collect use tax, the representative may file a claim for refund for use tax on the difference between his or her cost, and the amount upon which the section 6015 retailer based the use tax which it collected. 11/24/93.

475.0168.800 **Refusal to Accept a Resale Certificate.** An out-of-state firm purchases property which it uses to manufacture a spa. It picks up the property in California with its own trucks. The California seller refuses to accept a resale certificate from the out-of-state firm.

A seller is not required to accept a resale certificate. If, for example, it had reason to believe that spas were being sold and delivered by the out-of-state firm to California buyers, it could refuse unless the purchaser held a California seller's permit. 11/19/93.

475.0169 **Resale Certificates.** Corporation A, a wholly owned subsidiary of Corporation B, will be merged into B in accordance with applicable statutory merger provisions. A has on file numerous resale certificates issued to it by its customers.

Since B will become a successor to A by operation of law as a result of the statutory merger, new resale certificates need not be obtained. 12/10/87.

475.0169.200 **Resale Certificates—Item Consumed and Resold.** A California taxpayer distributes name brand eyewear to a network of authorized dealers. All products that it sells are noncorrective through the time of sale and delivery to the

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dealers. The taxpayer does not provide prescription lenses and does not make, buy, or sell corrective lenses. The eyewear is shipped with either sun or plano lenses. The frames sold with plano lenses may or may not be used for prescription purposes. Some dealers make specialized sun or safety lenses to be installed into the frame (therefore they purchase the frames with the less expensive plano lenses).

The taxpayer cannot determine which items are to be used by the dealer for corrective purposes and which will not. Often the dealers themselves do not know at the time of purchase.

Under this scenario, a dealer who purchases a lot of items knowing that some will be resold and some consumed but who, at the time of purchase, cannot in good faith determine which specific items will be resold and which will be consumed, may issue its vendors a resale certificate for the whole lot. The buyer would then be responsible for self reporting use tax on the items consumed. 10/17/95.

475.0170 **Resale Certificate—Printing Aids.** A corporation specializes in the preparation and printing of parts lists and maintenance catalogs. It prepared reproducible copies of illustrated parts and parts lists from which illustrated catalogs were printed. The catalogs were sold to Company B for resale to its customers. For these contracts, the corporation subcontracted with a printer for the actual production of the catalogs. The printer invoiced the corporation for the printing and they in turn, billed Company B.

On later contracts, the corporation did not contract for the sale of the catalogs. Rather it prepared reproducible copies of the catalog and delivered same to the printer designated by Company B. Company B had contracted directly with the printer for the production of the catalogs to be resold. The corporation's responsibility ceased upon delivery of the camera ready or reproducible copies to the printer.

For these later contracts, the corporation had received purchase orders from Company B stating: "For resale. Not subject to California Sales and Use Tax. Seller's Permit Number (permit number given)."

Under these contracts, the corporation retained title to the camera ready art and reproducible copies used by the printer. However, Company B would purchase copies of the camera ready artwork, used by the printer, for ten cents per page.

The furnishing of the camera ready art and reproducible copies by the corporation to Company B were leases subject to tax. The statement on the purchase orders was ineffective, because: (1) the purchase orders with the "For Resale" notation did not call to purchase the camera ready artwork or reproducible copies, only the catalogs; and (2) since the corporation retained title to the camera ready art, and knew the reproducible copies were not going to be resold, it could not accept the certificate in "good faith". 4/12/73.

475.0175 **Resales Made Under Predecessor's Resale Certificates.** A partnership incorporated using the partnership's business name as its corporate name. The partnership timely informs the Board of its dissolution. The Board

RESALE CERTIFICATES (Contd.)

cancels the partnership's seller's permit and simultaneously the corporation obtains a new seller's permit from the Board. The partnership during the regular course of business had issued resale certificates that met the requirements of Regulation 1668. The tax consequence of vendors, relying on the resale certificates issued by the partnership, selling extax for resale to the corporation is discussed below.

(1) Since the resale certificates were issued to the vendors by a person other than the current purchaser, those resale certificates would not necessarily relieve the seller of the liability for sales tax. If the corporation resold the purchased property without use and if the vendors could establish this, the vendors would not owe sales tax on these sales to the corporation. (Regulation 1668(c))

(2) Unless the vendors had knowledge that the partnership that issued the resale certificates was not the same as the corporation making the ex-tax purchases, the integrity of the Sales and Use Tax Law requires the corporation to affirmatively notify the vendors that they may not rely on those resale certificates when making sales to the corporation. Otherwise the corporation will be regarded as having adopted the resale certificates. In such a case, if the corporation uses the purchased property for any purpose other than retention, demonstration or display while holding it for sale in the regular course of business, the corporation will owe tax measured by the purchase price of such property. 2/6/90.

475.0185 **Resale Certificate—Unlicensed Entity.** A sales contract contained the following statement. ''Buyer claims to have a tax resale number (permit number shown). It is understood by the parties that if said number is disallowed by the State Board of Equalization, then buyer agrees to add 5% sales tax to this transaction''. The permit number shown in the contract was not held by the buyer, but instead was issued to a corporation of which the buyer was president. The statement in the contract does not meet the requirements of Regulation 1668 and does not qualify as a resale certificate. 4/9/71.

475.0193 **Retailer.** A person may be considered a dealer in stamps (i.e., will conduct business as a seller) only if he is engaged in the business of selling stamps in addition to any purchases for investment (consumption) he may otherwise make. Even if he qualifies as a dealer in stamps, he may not issue resale certificates for purchases as an investment (as opposed to purchases in stock and trade). The purchase of a long term investment is a purchase for use, and if the person has issued resale certificates for such stamps, tax must be paid measured by the sales price.

It is clear that a person who purchases stamps with the intention to resell in the ordinary course of business of selling that kind of tangible personal property may, in addition, purchase stamps for consumption. A purchase with the expectation of an eventual resale to realize a gain does not preclude the determination that the purchase was also for storage, use or other consumption within the meaning of the Sales and Use Tax Law.

RESALE CERTIFICATES (Contd.)

This conclusion is based on the meaning of holding goods for sale in the ordinary course of business. The ‘‘business’’ of a seller means a business of one whose activity and concern is the distribution and sale of goods. This is in contrast to the business of an investor whose purpose is to hold goods from the market as a store of value. 8/6/65.

475.0200 **Returned Merchandise.** Use tax applies to the material cost of a manufactured item where the materials are purchased under a resale certificate, and the item is later given away, even though, prior to the gift, the manufactured item is sold, when the sale is rescinded and the item is later returned by the buyer to the seller. 7/28/65.

475.0215 **Space Launch Vehicle.** Company A is engaged in the business of designing, engineering, and manufacturing, among other items, space launch systems. Company B, a wholly owned subsidiary, is established to market and sell launch service programs to commercial customers. The services include the launch vehicle, launch operation, spacecraft integration, mission management, and post launch validation of spacecraft separation and orbit. Company B contracts with Company A for the purchase of the launch vehicle and for launch services. All contracts between Company B and Company A provide that Company A must deliver title to or possession of the launch vehicle to Company B out of state. All transportation charges are paid by Company A. Company A contracts with the U.S. Air Force to transport the vehicle out of state as no other carrier has the capability to move the vehicle.

Assuming the transaction between Company A and Company B is an arm’s length transaction, Company A may issue resale certificates to its suppliers for property incorporated into the vehicle. Its sale to Company B would be exempt as a sale in interstate commerce. 10/4/93. (Am. 2002–2).

475.0220 **Time Limit for Holding Property for Resale.** A taxpayer purchases a light aircraft manufacturing kit for the sole purpose of assembling the aircraft and holding it for resale. There are no time limits for the subsequent resale of the aircraft which would trigger a use tax liability against the purchaser so long as it is actually being held for resale and there is no intervening use of the aircraft, other than testing, demonstration, or display prior to the time that the aircraft is sold. 6/30/97.

RESALE CERTIFICATES (Contd.)

475.0225 **Timeliness.** A retailer sells equipment which he/she installs. The customer is allowed to test the equipment for 30 to 90 days and sometimes longer. If the customer does not accept the equipment it is returned to the retailer and the sale is voided. Frequently, the purchaser plans to resell the equipment and lease it back.

A resale certificate is timely, if it is accepted within the normal billing period. If the customer is not billed until after he/she accepts the equipment, a certificate accepted during the billing period is timely notwithstanding that the title may have passed upon the initial installation of the equipment. However, even if taken timely, a resale certificate will relieve a retailer of tax liability only if taken in good faith. It does not appear likely that a company would hold a piece of equipment for thirty to ninety days without making some functional use out of it, such as manufacturing other property. If the retailer has reason to believe that the purchaser will functionally use the equipment prior to the sale and leaseback, the retailer would not be regarded as accepting the resale certificate in good faith. 9/19/89.

475.0228 **Timely Issued Certificate.** A vendor receives a purchase order from a customer for computer equipment. The equipment is shipped and invoiced to a customer in California. Sales tax is charged on the invoice. Four months after the initial invoice, a lessor contacts the vendor stating that it is leasing the equipment to the customer. The lessor requests that the vendor bill the lessor directly without sales tax for the equipment and that the vendor credit the customer for the initial invoice and sales tax. The lessor sends the vendor a resale certificate dated four months after the original invoice.

Under this scenario, there appears to have been a binding contract between the vendor and the customer for the sale of the equipment to the customer. The customer had a binding obligation to pay the vendor for the equipment. It also appears that the customer sold the equipment to a lessor and leased the equipment back. Under these circumstances, a resale certificate would not relieve the vendor of liability for tax since a certificate, even if issued by the customer, would not be timely. Rather, it must be shown that the customer actually sold the property prior to using it. If the customer did, in fact, resell the property prior to use, it would be entitled to a tax-paid purchases resold deduction with respect to the tax paid vendor. 10/23/89.

475.0236 **Resale Certificates—Aerospace Decision.** As a result of the decision in *Aerospace Corp.* v. *S. B. E.* (1990) 218 Cal.App.3d 1300, a government contractor may treat overhead costs as purchases for resale to the United States if the contract contains the title passing clauses set forth in FAR52.232.16(d). The contractor should provide the supplier with a resale certificate containing the statement that the goods are being purchased for resale in the regular course of business. 8/3/92.

475.0238 **Sale of Laundry for Resale.** A firm purchases a laundry with the intent of selling it. It operates the laundry for six months while it is seeking a buyer. Since the firm intended to operate the laundry while looking for a

purchaser, it may not issue a resale certificate for the laundry equipment or opt to report tax on fair rental value on the theory that it is demonstrating and displaying the equipment while holding it for resale. 5/16/97.

475.0240 **United States, Resale to; Contractors.** A resale certificate is properly given by a vendee when the latter resells to the United States, except as to property used in performing contracts to construct improvements. 12/1/50.

475.0510 **Validity of Resale Certificate.** A taxpayer sells silk screen inks, supplies, and equipment, including ink thinners. The taxpayer accepts resale certificates in good faith from customers known to be in the silk screen printing industry. In addition to selling inks ex-tax, the taxpayer sold ink thinners ex-tax. Although it may be assumed that the thinners had evaporated before the products to which they had been applied were sold, recognition must be given to the fact that a resale certificate which specifically mentioned thinners was issued by the purchaser and accepted in good faith pursuant to section 6092. Accordingly, it relieves the seller from liability for the sales tax. In this situation, the purchaser, having given the certificates, should be held liable for the use tax on the purchase. 5/8/72.

475.0511 **Validity of Resale Certificates.** A resale certificate is not valid if the name of the purchaser shown on the certificate is other than the purchaser. Also, the signatures of the purchaser, his agent, or employee of the purchaser must be an original signature and not a photocopy. 3/3/89.

475.0850 **XYZ Letter as a Resale Certificate.** An XYZ letter is not to be treated as a resale certificate in the sense of relieving the seller from liability for sales tax if taken timely and in good faith from a person engaged in selling tangible personal property and holding a seller's permit. Rather, an XYZ letter is merely an item of evidence which may help a seller satisfy the burden of proving that a sale of tangible personal property was not at retail, even though a resale certificate was not timely obtained. The acceptance of an XYZ letter as relieving the seller of sales tax is at the discretion of the Board. In that sense, in exercising that discretion, the staff can insist on the good faith of the seller. 3/4/85.

475.0950 **Delivery by Authorized Computer Dealers.** A computer manufacturer offers an opportunity to employees to purchase personal computer products at discounted prices. Authorized computer dealers may participate in these transactions under agreement with the manufacturer.

Employees may place orders directly with the manufacturer or with participating dealers. A participating dealer, by agreement with the manufacturer, receives orders on the manufacturer's behalf, transfers possession of products that were ordered either at the store or directly from the manufacturer, and is responsible for the satisfaction of the manufacturer's purchases. A ''Dealer's Handling Fee'' is paid by the manufacturer in connection with the dealer's involvement in these employee transactions.

Purchases may be made by employees on either a cash basis or payroll deduction basis. Cash purchase orders must be placed with participating dealers.

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Payroll deduction purchases must be placed directly with the manufacturer. Employees must pick up the product ordered under either of the purchase options at the store of the participating dealer.

In situations where orders are placed directly with a participating dealer (cash purchases), a computer is delivered by the dealer out of its stock to the employee. The manufacturer replaces the computer on an item-for-item basis. Cash purchasers remit to the dealer the employee price for the product received plus applicable sales or use taxes. The amount received by the dealer as sales or use tax is retained by the dealer in partial payment of the ''Dealer's Handling Fee,'' and the manufacturer remits to dealer the balance of the handling fee due. The manufacturer timely reports all sales made under this program and pays all applicable sales and use taxes, whether the products delivered through the dealer's store were ordered by employee directly from it or by placing the order at the dealer's store. Title to all products, whether cash or payroll deduction purchases, passes from the manufacturer to the employees at the time of delivery to the employee by the dealer.

In situations where orders are placed directly with the participating dealers (cash purchases), the manufacturer is the retailer and the transaction is subject to sales tax. In the circumstances of this case, it is permissible for the dealer to collect reimbursement from purchases and to account to its principal in the transaction and retain the reimbursement as a credit against the handling fee due the dealer.

In situations where computers are purchased under the payroll deduction plan, the orders are forwarded to the manufacturer's out-of-state plant. The computers are shipped from the out-of-state plant to the participating dealer and are subsequently picked up by the employee. Tax reimbursement amounts are not collected by the dealer. In these circumstances, the manufacturer also is the retailer of the product and the manufacturer is required to collect use tax directly from the purchases and remit the tax to the Board.

In order for the dealer to document the transaction as a nonretailer sale, the dealer should obtain a resale certificate from manufacturer for products which the dealer delivers from its own inventory to the manufacturer's employee purchasers. 3/22/84.

RESEARCH AND DEVELOPMENT
See Service Enterprises Generally.

477.0000 RESEARCH AND DEVELOPMENT CONTRACTS—Regulation 1501.1

477.0770 **Charges for Nonrecurring Engineering.** Taxpayer, a manufacturer of semiconductor devices, designs circuit boards which it uses as a form of tooling to produce semiconductor devices for its customers. Taxpayer makes a separate charge designated as nonrecurring engineering (NRE) to cover the cost of design and manufacturing the circuit boards. Title to the circuit board and design file is retained by the taxpayer.

RESEARCH, ETC. (Contd.)

When the customer never receives title to, or possession of, the tooling, the tooling charges are regarded as part of the manufacturer's cost of manufacturing the finished product, which costs are passed on to the customer. The semiconductor devices are not purchased for resale and, thus, the charge for engineering is part of gross receipts from the sale of the semiconductor devices. Tax applies to the charges for manufacturing this board whether or not they are separately stated (e.g., a charge for the board and tooling) or billed as a single lump sum. 6/25/97.

477.0775 **Computer Assisted Design (CAD).** A taxpayer is in the business of producing photoplots, which are manufacturing aids (tooling) used to produce printed circuit boards (PCBs). To create the photoplots, the taxpayer uses its computers and computer-aided design (CAD) software to design and layout the electronic components on PCBs, from paperwork and schematics provided by its customers. The CAD software is used to manipulate data and generate the optimum design for the boards. The taxpayer's photo lab then uses the CAD program to create the photoplots.

The taxpayer uses the photoplots to produce the printed circuit boards for its customer. The taxpayer's CAD design charges are separately stated from the charges for the photoplots (tooling). Customers' purchase orders either state that title to tooling transfers to the customer, that the tooling becomes the customer's property once the customer paid for it, or that title passes to the customer after a use of the tooling is already made.

Under Regulation 1501.1(b)(3), ''CUSTOM-MADE ITEMS,'' tax applies to the entire contract price without regard to the fact that research, design, and development charges may be separately stated. In other words, the full costs of producing the tooling must be considered. Separately stated design charges do not change this. The photoplot is a mirror image of the PCBs which it produces. All the necessary engineering for the PCBs would have already occurred at the point in time when the photoplot is produced. Accordingly, the charges for the photoplot as well as the separately stated charges for CAD design are subject to tax.

Since some of the purchase orders contain clauses which only pass title to the customer after a use of the tooling is already made, a taxable use occurs before title transfers. Therefore, in those instances, tax is due on the taxpayer's material cost. If the taxpayer already paid tax on cost, it would not be entitled to a tax-paid purchases resold deduction on its subsequent sale of tooling. 2/26/97.

477.1000 **Design and Develop Contract.** A taxpayer entered into a contract with a customer to design and develop a custom test instrument for installation of fiber optic equipment. The contract called for initial delivery by the taxpayer of three prototypes to be used for primary evaluation of design and mechanical flaws. At later dates, eleven units were to be delivered consisting of changes and improvements as a result of the evaluation of the prototypes. This ''final unit'' delivery was to ''include all documentation to manufacture and/or repair the units.'' The customer would exclusively own all intellectual property conceived or reduced to practice which related to the prototype test instruments. All other

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intellectual property conceived or reduced to practice and developed under the agreement by the taxpayer would be jointly owned by the taxpayer and the customer. All tangible materials including but not limited to records, drawings, models, apertures, samples and the like conceived or produced in the design and development of the test instruments by the taxpayer, including all documents required to manufacture and/or repair the test instruments, were to be delivered to the customer no later than upon delivery of the ''final units.''

In analyzing the contract between the taxpayer and the customer, a distinction must be made between the contract to manufacture a custom-made item (a sale) and the contract to provide research and development (a service). From the language of the contract, it is apparent that the customer wanted the test instruments designed and developed so that the customer would have the option to manufacture and sell the instruments. In other words, the customer was not merely interested in the production of custom made items for its own consumption or resale, but wanted to obtain all information necessary to both manufacture and repair the test instruments. The delivery of the first three units (prototypes) were for primary evaluation which consisted of testing for verification of a design to specifications and also testing to determine if alternative design features are necessary. As such, charges related to the research and development of the first units and to their delivery to the customer for ''primary evaluation'' are not subject to sales tax under Regulation 1501.1.

It is not clear whether the ''final units'' delivered by the taxpayer are also prototypes transferred for informational and testing purposes (Regulation 1501.1(a)(7)). However, it is possible the ''final units'' are sales of additional prototypes transferred in a qualified research and development contract for purposes other than informational testing and use. When a functional use occurs such as actual functional use by the customer of the ''final units'' to try out its installation of fiber optic equipment (i.e., the use for which the test instrument was designed) the sale of such units is subject to tax. (Regulation 1501.1(b)(2).) In other words, if the customer's objective in receiving the ''final units'' is for functional use (use for which the property was designed) which occurs after completion of the research and development, the transfer of the ''final units'' is a sale subject to sales tax. Since the contract does not state a value for the ''final units,'' the measure of tax is the computed fair market value as determined by applying a factor of three to the cost of the direct materials used in the production of the ''final units.'' 1/3/96.

477.2001 **Manufacturer of Circuit Board.** The manufacturer's testing of circuit boards is a part of its manufacturing process in order to sell or lease the board to its customers. Therefore, tax applies to its charges for testing whether or not these charges are separately stated on the manufacturer's invoice to its customer. 6/25/97.

477.2300 **Materials Used Experimentally in Development of Prototype.** An opinion was requested with regard to whether or not a manufacturer was liable for tax on any material used during the development phase or if the contract was for

RESEARCH, ETC. (Contd.)

the manufacture of a prototype and material not incorporated into the prototype can be considered as manufacturing waste.

The agreement expressly provides for the development of a production prototype and the facts state that one was built and shipped out of state for use there. The agreement, under the development phase, calls for the construction of ''suitable experimental rigs necessary to prove the separate functions and combination of functions, the construction of a development prototype into which separate functions are integrated, and the construction of a production prototype . . . '' ''Experimental rigs'' and ''development prototype'' are not defined; however, the words imply that these are for experimental purposes rather than for incorporation into the production prototype. The agreement further provides that the development stage shall be completed upon the customer's acceptance of the production prototype.

The use of materials later in experimental activities is subject to the tax and it is immaterial that the product of the experiment is sold. (Atty. Gen. Op. 46–381). It is concluded that, to the extent that materials are used for experimental activities in the development of the production prototype and not incorporated into the prototype delivered, the manufacturer is liable for the tax. 8/4/71.

RESTAURANTS
See Taxable Sales of Food Product.

RETAIL SALES
See Sale.

480.0000 RETAILER
See also Auctioneers; Automobile Dealers and Salesmen; Occasional Sales—Sale of a Business—Business Reorganization; Service Enterprises Generally.

480.0020 **Agent Importing Automobiles.** An agent who contracts with his principal to arrange for the purchase of an automobile from a foreign manufacturer or distributor and for its importation and delivery to the principal is not a retailer where title vests directly in the principal overseas and the agent renders a final statement of account showing all disbursements made on behalf of the principal and the amount of his commission. 1/17/66.

480.0022 **Beauty College.** A beauty college charges $1600 tuition for a prescribed course in cosmetology. This lump-sum charge includes 1699 hours of training and a textbook, printed material, and supply kit consisting of a curling iron, blow dryer, brushes, scissors, and hair razor. The beauty college purchases the items tax paid at source. Total cost to the beauty college for all of the above is approximately $75.

Under the circumstances, the beauty college's tax liability is extinguished by paying tax at source. The college provides extensive classroom instruction and the cost of the materials is less than 5% of the tuition charge. Also, the college purchases the material in fabricated form. Thus, there is no fabrication labor which escapes taxation. 1/31/80.

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480.0025 **Buying Groups.** A group of doctors form a corporation for the purpose of buying ophthalmic supplies. Vendors have oral agreements with the corporation that the buying group will pay for the supplies ordered by its member doctors. The member doctors receive a list of vendors who have agreed to bill the buying group at quantity discount prices. The doctors do not receive the discount unless the billing and payment is handled by the buying group. The doctors have a written agreement with the buying group which sets out the terms of payment by the doctors. Under these circumstances, the buying group is the retailer of the ophthalimic supplies purchased by its member doctors and is required to hold a seller's permit. 11/16/88.

480.0027 **Card Lock Fueling Systems—Out-of-State Participant.** Owners of unattended card lock fueling stations formed a network whereby their customers may purchase fuel at any of the network's participating fueling stations by use of a credit card issued by its card lock station. The network includes participants who do not operate in California except for network transactions to its customers in California. There is a network clearing house for tracking and reporting the participant's fuel purchased by a participant's customer at card lock fueling stations operated by other participants.

Under this scenario, the credit card issuer (Foreign Participant) has actually contracted to sell fuel to the card holder and purchases the fuel from the Host Participant for resale. Accordingly, the Foreign Participant makes the retail sale and the Host Participant delivers the fuel on behalf of the Foreign Participant. The Host Participant is considered making taxable retail sales under section 6007 until the Foreign Participant registers with the Board as a retailer. 7/3/89.

480.0028 **Catering Truck Operators.** When a catering house hires a person to operate a catering truck to sell products on behalf of the catering house, the catering house rather than the operator of the truck is the retailer responsible for reporting and paying sales tax on the sales. Whether the catering house hires the operator to sell products on its behalf or the operator purchases property from the catering house for resale is a question of fact which is answered by the relevant evidence. For example, the catering house's paying a salary to the truck operator and making normal withholding from the salary for social security taxes, income taxes, unemployment insurance, and worker's compensation, is strong evidence that the catering house is the retailer of the property.

The following is evidence which indicates that the truck operator is the retailer. No one factor is determinative; the Board will make a determination based on all facts available.

(1) The contract between the catering house and the truck operator specifies that the operator is an independent contractor.

(2) The operator is not required to purchase all food and supplies from the catering house.

(3) The truck operator is not required to provide an accounting to the catering house for the operator's receipts. Rather, the income from the sales belongs to the operator.

(4) The operator prepares a Schedule C for income tax purposes.

(5) The truck operator rather than the catering house determines the sales price of the property for sale. 12/31/93.

480.0030 **Chiropractors—Vitamins.** Effective January 1, 1979, licensed chiropractors will be considered consumers with respect to vitamins, minerals, dietary supplements, and orthotic devices used or furnished by them in the performance of their professional services regardless of whether or not a separate charge is made when these items are supplied to their patients. If other types of items are sold by chiropractors and a separate charge is made, they will be considered the retailers of the items. 10/26/78.

480.0040 **Correspondence Course. Books and Lesson Materials.** An out-of-state agency which sells correspondence school courses is a retailer of the lesson materials and books regularly sold to its students and is liable for collection of use tax on the fair retail selling price of the materials and books. 11/19/65.

480.0060 **Creditors.** Where by contract, creditors of a retailer agree to assume control, acquire possession and operate the retailer's business for a definite period, such creditors become a retailer as defined in Section 6015. 3/5/54.

480.0080 **Dealer Aiding Purchaser from Third Party.** Where an airplane dealer aids a prospective purchaser in locating and purchasing an airplane from a third party by locating a willing seller, having the plane brought to his place of business, or aiding the buyer in examining the plane and in addition obtains financing for the buyer by executing a conditional sales contract as the seller and discounting it with a bank with recourse he is the retailer of the plane and makes a taxable sale. 3/29/65.

480.0082 **Distributors for a Section 6015 Retailer.** A person is a distributor for a "section 6015 retailer" and also makes sales of other property. The person is required to hold a seller's permit and to report separately the retail sales of other property. 5/1/95.

480.0085 **Drop Shipments—Payment of Tax Directly by Consumer.** A California taxpayer sells property to an out-of-state retailer who is not engaged in business in this state. The retailer directs the taxpayer to deliver the property to a California consumer. The consumer informs the taxpayer that it self assesses the tax and provides the taxpayer with its seller's permit number.

Under section 6007 of the Revenue and Taxation Code, the taxpayer is liable to the Board for the tax. The mere statement by a consumer who is a permit holder that it self-assesses the tax does not relieve the taxpayer from liability. The taxpayer will be relieved of liability if it can show that the consumer has actually paid the tax to the Board. 8/9/94.

480.0091 **Equipment Purchased From Retailer.** A California contractor ordered a special woodworking machine that is only manufactured in England. The manufacturer made sales only to retailer's located in England (sales for resale) except for one sale made to a California contractor.

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Even though the manufacturer only made sales for resale to its customers located in England, the manufacturer is a retailer under section 6015 by virtue of making a retail sale to the California contractor. Therefore, the sale to the contractor is not considered an occasional sale and the contractor owes use tax on the purchase price of the machine. 3/17/95.

480.0095 **European Delivery of Motor Vehicle.** A person orders a car, which is manufactured in Europe, through a California dealership for delivery in Europe. The dealership arranges the delivery through the automobile manufacturer's corporate representative in the United States. The dealership has the customer fill out a standard purchase order form, showing the dealer as the seller of the vehicle. The order form is signed by the customer. The dealership also has the customer execute a form called ''Delivery in Europe Car Order'' which specifies the date and place requested for the delivery. This latter form states that the customer is ordering the vehicle from the manufacturer's corporate representative. Either the dealership or the customer sends this to the representative. The dealership and the manufacturer's representative have actual knowledge that the purchaser was a California resident, and that the vehicle would be shipped to California within 90 days of the delivery in Europe.

Since the ''Delivery in Europe Car Order'' identifies the manufacturer's representative as the seller, there is a strong case for treating that company as a retailer responsible for collecting the tax. However, other evidence indicates that the dealership is also a retailer. The dealership is an independent contractor which apparently has no agency agreement with the manufacturer's representative. It handles all negotiations with the customer and prepares standard purchase orders showing itself as the seller. It collects payments from customers and arranges for shipment of the vehicles to California. In the manufacturer's sales literature and internal documents, local dealers are referred to as sellers.

Both the dealership and the manufacturer's representative are acting as sellers and retailers of these vehicles and, since they are acting in combination as a unit, they can be regarded as a single person for sales and use tax purposes. Therefore, the duty to collect use tax could properly be asserted against either company or both.

Other factors affecting whether the dealership or the manufacturer's representative is the retailer are as follows:

(1) Does the dealership record these transactions as purchases and sales on its books?

(2) Does the manufacturer's representative in fact set the price, or does it merely ''approve'' the price negotiated by the dealership?

(3) Does the dealership accept trade-ins?

(4) If sales are financed, how is the financing arranged?

(5) If commissions are involved, how are they determined?

(6) Other pertinent information from the manufacturer's representative instructional pamphlet. 1/13/86.

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480.0100 **Farm Labor Contractor.** Under Section 13(a)(2) and 13(a)(20) of the Fair Labor Standards Act (29 U.S.C.A. Section 213(a)(2), 213(a)(20)), employees of ''retail establishments'' are exempt from coverage of the act. Pursuant to the decision of the U.S. District Court in *Mitchell* v. *Anderson,* 235 F.2d 638, the Wage-Hour Administrator in an opinion dated November 7, 1961, has concluded that kitchen employees of a farm labor contractor serving meals to Mexican Nationals employed by farmers, are not employees of a ''retail establishment.'' Although, for the purposes of the Fair Labor Standards Act, the contractor is not a ''retail establishment,'' nevertheless, the contractor is a ''retailer,'' as defined in Section 6015 of the Revenue and Taxation Code, whose gross receipts from sales of meals are subject to sales tax. 12/11/64.

480.0115 **Investor vs. Retailer—Guidelines.** The law presumes that the gross receipts from the sales are subject to sales tax and that property shipped or brought into this state by the purchaser was purchased from a retailer for use in the state. Specifically, sales of tangible personal property to persons who hold the property for investment purposes or who hold the property as part of a collection are retail sales.

The following criteria will be considered in determining whether a person is holding property for resale in the regular course of business or is holding property

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for other purposes. The criteria are generally the same as those in Sales and Use Tax Regulation 1599 pertaining to the purchase of coins and bullion as an investment.

(1) Whether the person has a place of business or otherwise clearly holds out to the public that he or she is engaged in the business of making retail sales of the type of property in question.

(2) Whether or not the person has records typical of a normal business (e.g., accounting records, advertising, letterhead stationary, business cards, or letterhead invoices).

(3) Whether the person has established suppliers of inventory.

(4) Whether the person makes sales sufficient in number, scope and character to require the person to hold a seller's permit for the sale of the type of tangible personal property in question.

(5) Whether the person does, in fact, hold a business license and seller's permit for sales of the tangible personal property in question.

(6) Whether there is evidence of merchandise available for sale to the public with discernible sales prices.

(7) Whether the person's markup over cost is an amount which shows a reasonable expectation of sale.

(8) Whether the person treats the activity as a business for income tax purposes and regularly reports income from the activity. 12/31/93.

480.0120 **Jobbers.** All of the sales made by jobbers on behalf of an office supply corporation are taxable to the corporation where all sales solicited are in the corporation's name on order forms approved by the corporation; the right to accept or refuse an order or make other adjustments remains with the corporaton; all bills and invoices are made by the corporation; title to merchandise remains with the corporation; payment is made directly to the corporation, unless otherwise authorized, and any payment made directly to the jobber is the property of the corporation, and the jobber may not use the corporation's name unless specifically authorized. Although the jobbers are independent firms which handle products of other manufacturers when they are soliciting for the corporation in question, they are not selling on their own behalf, and thus are not liable for the tax. 4/19/67.

480.0140 **Number of Sales.** A transfer of tangible personal property which is exempt as a Section 6006.5(b) ''occasional sale'' is not one of a series of sales to be counted in determining whether the transferor is a retailer under Section 6019 of the Revenue and Taxation Code. 2/2/65.

480.0160 **Number of Sales.** Section 6019 does not limit the definition of ''retailer'' in Section 6015. It is another definition of a ''retailer'' applicable to those persons making more than two retail sales in any 12-month period, and does not include as a necessary element the ''engaging in business,'' which is common in the definition of ''seller'' under Section 6014.

RETAILER (Contd.)

Sales by a person may not be sufficient to bring him within the scope of Section 6019, yet such sales may be of a kind the gross receipts from which are includable in the measure of the tax. This may be true, even if the sales were of products specifically exempt from tax by reason of the use to which such products were put, not to the kind of products sold. Under the latter situation, the seller is required to have a permit and sales of property used in the activity would not be occasional sales, but subject to tax. 12/4/53.

480.0193 **Optometrist Buying Group.** A group purchases optometric supplies for its member doctors. If the facts are as follows, the group would not be considered a retailer and would not be required to obtain a seller's permit:

(1) The invoices of the group's vendors show the member doctors as the purchasers.

(2) The group has agreements with the vendors which provide that if the group does not pay the vendors, the vendors have the right to seek payment for the supplies directly from the member doctors.

(3) The group pays the vendors for the supplies ordered by a member doctor only after it receives payment from the member doctor.

If these are not the facts, the group is a retailer, not merely a billing agent, with transactions structured as sales by the vendor to the group with immediate resale to the member doctors, and the shipping arrangements are standard drop shipment from the vendor to the group's customers, not to the vendor's customers. 10/11/89.

480.0200 **Out-of-State Seller.** A seller who makes retail sales outside this state is properly regarded as a retailer under Revenue and Taxation Code section 6015(b) (now section 6015(a)(2)). Thus the use tax applies with respect to property purchased from out-of-state firms clearly engaged in the business of selling tangible personal property at retail, even though their activities are confined to states other than California. 7/17/57. 6/26/02. (Am. 2002–3).

480.0204 **Overpayment of Tax by Section 6015 Retailer.** A Section 6015 retailer collects tax reimbursement on all of its sales to its ''consultants.'' In some cases, the consultant's retail customer is located outside of California and the product is shipped by the consultant to the out-of-state customer in accordance with the contract of sale. The consultant also sells items for less than the suggested retail price. A refund of any tax overpaid on such sales that the section 6015 retailer can document may be refunded to the Section 6015 retailer subject to the requirement in section 6901.5 that the tax reimbursement be returned to the person(s) paying it. 8/26/96. (Am. 2000–1).

480.0207 **Personal Liability of Assignee.** While an assignee for the benefit of creditors like a trustee in bankruptcy is a ''person'' under California Revenue and Taxation Code section 6005, and while an assignee and a trustee in bankruptcy may be a retailer under section 6019, both an assignee and a trustee act in representative capacity and have no personal liability. Any tax liability is the liability of the debtor estate only. 2/5/91.

RETAILER (Contd.)

480.0210 **Publishers Advertising Beauty Products.** An advertisement for beauty products is contained in a publication. The end of the advertisement, in fine print, states that the payments are received on behalf of ''beauty sampler participants'' featured in the advertisement. The purchasing instructions were printed beside a tear-out card which stated in part to simply check your Beauty Collection choices on the attached card (or a separate piece of paper) and mail along with your remittance to the publisher at an Ohio address. On the card itself was an ''800'' number for telephone orders. The entity handling the telephone and mail orders is a wholly owned subsidiary or division of the publisher.

The addition of the fine print matter does not remove the publisher (or its subsidiary) from being a retailer. Prospective customers have no reason to believe that they are purchasing from or dealing with any entity but the publisher. The checks are made out to the publisher and mailed to the publisher at an Ohio address. The telephone number is the publisher's and the extension goes to the subsidiary or division of the company. 7/27/93.

480.0220 **Radio and Television Stations.** Radio and television stations may become retailers and subject to sales tax with respect to mail order sales of merchandise made as a result of advertising made over such stations as follows:

(a) The merchandise sold is mailed directly to the purchaser from a point outside California. Payment is made either C.O.D. or is sent with the order to such stations.

(b) The aforesaid sale has been initiated when the advertising directs the prospective purchaser to place an order by telephoning a certain number and this number is that of the station and is serviced by station employees and the advertising does not disclose the identity of the out-of-state seller.

(c) Like principles apply to orders received at such stations by mail. 12/4/53.

480.0240 **Rental of Display Area.** The rental of display area to private owners of used cars for the sole purpose of providing space where such owners may display their vehicles, the owners to conduct all sales activities themselves, does not constitute the lessor a retailer of such vehicles subject to sales tax. 7/6/53.

480.0250 **Retailer.** A manufacturing firm has independent dealers located in Montana and Oregon. The dealers entered California on a regular basis to take orders. The dealers did not have to obtain the manufacturer's approval for an order. In some transactions the customers named the dealer as the payee on the check. The dealers set the selling price. In some cases, when the customer rescinded the transaction, the dealer refunded the money directly or arranged for the return of the property.

The manufacturer's name and address, not the dealer's, was prominently printed on the sales invoice. All credit card payments were made through the manufacturer's account. In some transactions, the deposit payable was made to the manufacturer. The manufacturer notified the customer when the property was to be manufactured or shipped. Although the manufacturer did not require approval of an order, it was not necessary since the manufacturer obtained payment before sending the property.

RETAILER (Contd.)

Under these circumstances, the manufacturer is the retailer and is required to collect use tax since it had representatives operating in this state. 4/25/95.

480.0251 **Retailer.** If a person sells a used hammer and makes no other sales during any twelve month period in which the sale of the hammer occurred, that person is not a ''seller'' and the sale of the hammer is an exempt occasional sale. However, if that person had opened a hardware store, made a single sale of a hammer to a consumer, and then closed down, the person would be a seller and the sale of the hammer would be a taxable retail sale because the person would have been in the business of selling tangible personal property, even though only one sale had been made. 10/23/92.

480.0290 **Sales of Catalogs.** A firm publishes a catalog which lists mail order catalogs from a variety of unrelated mail order firms. It receives orders for the mail order catalogs together with a payment. It forwards the order to the specific mail order firm which, in turn, mails the catalog to the customer.

The firm publishing the catalog which lists the mail order catalogs is the retailer of the catalogs furnished. The sales of the catalogs are subject to tax. 1/27/92.

480.0300 **Sales to Independent Distributors.** Under Section 6015(b) a manufacturer of cosmetic products may be treated as the retailer of products sold by independent distributors upon approval of the Board of Equalization. After

RETAILER (Contd.)

approval and written notification from the Board, the manufacturer is responsible for reporting and paying tax on the sales price charged by the independent distributor. 1/20/93.

480.0306 **Sales of "Personal Picture" Certificates.** A California taxpayer sells to customers "personal picture" certificates which are redeemable for personalized picture items such as personalized calendars, business cards with picture, postcards, etc. The taxpayer purchases the certificates from a supplier located out of state. The customer mails the certificate (along with a picture and text) to the out-of-state supplier. The supplier then ships the finished product directly to the customer on the taxpayer's behalf.

Under these facts, the taxpayer is regarded as the retailer of the personalized calendars, postcards, etc., purchased by the customers. Under this arrangement, title to these items passes from the out-of-state supplier to the taxpayer (and then from the taxpayer to the customer) outside this state when the out-of-state supplier completes its responsibilities with respect to physical delivery of the property. (See Cal. U. Com. Code section 2401.) Since title to this property passes outside this state, the taxpayer's customers owe use tax measured by the purchase price of the property. The taxpayer is responsible to collect this tax from its customers and remit it to the Board since the taxpayer is the retailer of these goods. (Section 6203.) 7/02/96.

480.0310 **Sales of Share Drafts.** The following statement on order forms is insufficient to establish a printer rather than a credit union is the retailer of share drafts:

"To: (name of share draft supplier)
c/o (credit union)
This will authorize you to charge my credit union share draft account for the cost of delivered share drafts ordered, plus California sales tax." 7/23/81.

480.0350 **Section 6015(b) Retailer—Sales to Holders of Seller's Permits.** A person, who has been classified by the Board as a section 6015(b) retailer, is responsible for tax on the ultimate retail selling price of the property sold by independent contractors to California consumers. A section 6015(b) retailer is considered the retailer of all sales made by its independent contractors, even those who have California seller's permits. Accordingly, a section 6015(b) retailer cannot properly accept a resale certificate with respect to its sales to its independent contractors despite the fact that they may have California seller's permits. 1/16/96.

480.0385 **Shopping Services.** A shopping service for individuals who lack the time or skills to shop for themselves purchases tangible personal property and pays the full retail price plus tax. The price charged to its clients includes the full retail price, plus a service charge for the labor in obtaining the item.

The shopping service is a "retailer" as defined in section 6015. It is transferring title to tangible personal property to its clients who are the consumers of these items. The gross receipts from the shopping service's sale of the property

RETAILER (Contd.)

to its clients is the total price charged to the clients including the service charges for the labor in obtaining the property. 11/4/86.

480.0400 **Single Sale.** A person in the business of designing and manufacturing custom machinery made only one sale, which was a retail sale, during a twelve month period. This sale is subject to tax since the person is in the business of selling tangible personal property and is therefore a ''seller'' pursuant to Section 6014. Once a person is a seller, that person is automatically a retailer whenever he or she makes a retail sale. 10/16/92.

480.0700 **Special Order Placed for Customers.** A taxpayer conducts a business for the taxpayer's customers of obtaining stereo and related equipment by way of mail order from out-of-state suppliers. A customer will complete an order agreement whereby the customer agrees to the terms and price of the piece of equipment. The taxpayer then calls an out-of-state supplier and places an order for the equipment. The supplier ships the equipment C.O.D. to the taxpayer. Upon receipt of the merchandise, the taxpayer informs the customer who then picks up the merchandise at the taxpayer's place of business. At the time of pick up, the customer pays for the merchandise a price which consists of the cost of the merchandise, shipping and handling, and a percentage mark up.

The facts involved in this situation are similar to that of a catalog store or a ''special order'' placed for a customer by a department store. In both of these situations, the sale which takes place when the item ordered is delivered to the customer is a retail sale. Therefore, the taxpayer is a retailer of the merchandise it orders and then transfers to its customer, and tax applies to the total gross receipts of such sales. 2/22/78.

485.0000 RETREADING AND RECAPPING TIRES—Regulation 1548

485.0020 **Itemization of Charges.** Recappers may, if they wish, itemize on their charges to their customers the selling price of the tread rubber of camelback used in retreading operations and pay the sales tax upon such itemized amounts. The Federal excise tax is includable in the gross receipts subject to tax. 8/8/56.

RETURNS, INFORMATION
See Information Returns.

490.0000 RETURNS, DEFECTS AND REPLACEMENTS—Regulation 1655
See Goods Damaged in Transit.

(a) RETURNED MERCHANDISE

(1) IN GENERAL

490.0016 **Arbitration Award.** In 1991, a taxpayer sold computer software to a purchaser pursuant to a sales contract which provided that any disputes between the parties shall be resolved through arbitration. In February 1994, the purchaser filed a ''Demand for Arbitration'' seeking a refund of the purchase price of the

computer software. The resulting arbitration award ordered the purchaser to return the software to the taxpayer and ordered the taxpayer to refund a portion of the purchase price to the purchaser. The taxpayer was ordered to pay the arbitration costs.

In this case, under the contract, the parties agreed to resolve all disputes through arbitration. Arbitration is a process of dispute resolution in which a neutral third party renders a decision after a hearing at which both parties have an opportunity to be heard. The arbitration award at issue herein ordered the taxpayer to refund a portion of the purchase price to the buyer. The taxpayer did not voluntarily refund the purchase price. Thus, the amounts paid by the seller to the buyer in accordance with the arbitration award are analogous to damages paid by the seller to the buyer as a result of litigation arising out of a sale transaction. (See *Southern California Edison Company* v. *State Board of Equalization* (1972) 7 Cal.3d 652.) Therefore, because the payment by the taxpayer to the buyer was pursuant to the arbitration award, the taxpayer does not qualify for a defective merchandise deduction under Regulation 1655. 2/6/96.

490.0030 **Interdivisional Returns.** An out-of-state manufacturing division of a corporation transferred tangible personal property to a division located in California for use by the California division. Use tax was paid with respect to the cost of the property to the manufacturing division when it purchased the component parts from third party suppliers. The property proved to be defective and was returned to the manufacturing division. That division replaced the defective property. The taxpayer claimed a returned merchandise deduction for return of the defective property.

Since there was no sale by the manufacturing division, there is no basis for regarding the transfers as being within the provisions for returned merchandise deduction. 8/31/76. (Am. 2000–1).

490.0034 **Manufacturer Replacement.** An out-of-state motor home manufacturer produced a model that was prone to catch fire in the engine compartment. The manufacturer offered for a limited time to exchange these motor homes for other models. The owners would be charged from $0 to $35,000 depending on the model they chose for the replacement. The owners were also responsible for tax and license on the new motor home.

A taxpayer purchased the particular model motor home from a dealer in Florida and subsequently acquired the replacement motor home in Iowa after paying the manufacturer an additional $12,000. The taxpayer subsequently drove it to California and applied for a tax clearance.

This transaction does not qualify under Civil Code section 1793.2 (the Lemon Law) because the customer must be given the option for cash restitution versus vehicle replacement. Also, the customer must be reimbursed for sales tax and license fees on the original transaction. In addition, the original vehicle was not purchased in California and, thus, no sales tax was remitted to California.

This transaction also does not qualify for a returned merchandise deduction since it was not returned to the original seller (Florida dealer). It was returned to

the manufacturer. Furthermore, the returned-merchandise deduction is only allowed to the retailer who paid the sales tax to California.

The Iowa dealer made a sale of the motor home in part to the manufacturer (i.e., the portion paid by the manufacturer for the dealer to make the exchange) and in part to the customer (the charge for the upgrade). The charge to the manufacturer is either for resale (if the replacement is pursuant to a mandatory warranty) or at retail (if the replacement is pursuant to an optional warranty). Even if the latter, since the transaction occurred in Iowa, California tax does not apply because the manufacturer used the property in Iowa by making the replacement. The part of the sale to the customer, the upgrade charge, was a retail sale to the customer. Since the customer purchased that motor home for use in California, it owes California use tax on the upgrade charge. 4/13/94.

490.0035 **Merchandise Returned After Extended Use.** A telephone company introduces a new line of telephones in touch-tone or rotary dial modes. The telephone company transfers title only to the telephone housing and not to the communications apparatus contained therein. The housing that accommodates the rotary dial features will not accommodate touch-tone and the housings are not, therefore, interchangeable. A touch-tone telephone is useless in a telephone service area with exclusive rotary dial service.

To maintain customers' goodwill, the telephone company has voluntarily adopted the policy of exchanging the customers' used touch-tone model (including both the housing and the communication apparatus contained therein) for an otherwise identical new rotary model completely without charge when the customer moves to a telephone service area with rotary dial service only. This exchange policy applies regardless of when the customers purchased the new line telephones, or the service area is serviced by another telephone company, or the customers move to another state or to a foreign country.

This exchange policy does not apply to customers moving into a touch-tone service area as rotary models are entirely compatible with touch-tone service. The exchange for a new rotary model is of the identical color, design and price as the exchange telephone (unless a price change had been effected during interim in which event there is still no charge). Under the above circumstances, the exchange of the new line touch-tone telephone for a new line rotary telephone is regarded as a returned merchandise transaction. The selling price of the replacement new line rotary telephone must equal or exceed the selling price (inclusive of sales tax) of the new line touch-tone model so that the customer receives full credit for the sales price for the touch-tone model.

Although it could be argued that this transaction should be treated as a trade-in transaction, since the customer may have the use of a touch-tone model telephone for an extended period of time prior to the exchange and since the exchange transaction occurs because of a change in circumstances of the customer which causes the customer to need a new and different item of property, this transaction is better treated as a returned merchandise transaction. Of particular importance is the fact that the customer receives credit for the full purchase price of the

returned item and not merely an allowance in accordance with the depreciated value of the item based upon its usage. 7/21/75.

490.0040 **Option to Resell.** Returned merchandise exclusion does not apply to package display stands which the customer resells to the original vendor pursuant to an option in the sales contract. There was not return of merchandise because of objective or subjective dissatisfaction. The exercise of the option to resell does not constitute a return of merchandise as contemplated in Section 6012(c)(2). 6/4/57.

490.0070 **Repossession of Franchise.** A franchisor repossesses a franchise and continues to operate it prior to resale. The repossession by the franchisor in cancellation of the remaining balance on the mortgage does not result in a ''sale.'' If the franchisor does not attempt to resell the franchise, tax will not apply to the franchisor's use of fixtures and equipment therein, unless it can be established that the repossession was a sham. However, if the return of the equipment by the franchisee is eligible for the returned merchandise deduction, a subsequent use by the franchisor would be subject to tax.

When the franchise is resold, the franchisor is liable for sales tax on the sale. 1/4/71.

490.0080 **Rescission v. Second Sale.** A rescission, not a second taxable sale, occurred when the buyer of a business defaulted on his fourth installment payment and the buyer and seller agreed that the business be returned to the seller. The retention of the first three installment payments by the seller does not defeat the rescission since such payments can be considered payment for the use of and profits from the business during the period the buyer was in possession. However, the original sale is taxable and no returned merchandise deduction is allowable because the full purchase price was not refunded. 9/4/64.

490.0085 **Restocking Charges.** To determine the costs of rehandling and restocking for purposes of Regulation 1655, the direct costs of any specific step in the sequence of actions occurring in the retaking of goods and their return to suppliers, are properly included. This would include, where applicable:

(1) Costs to handle the customer's request for authorization to return the merchandise.

(2) The cost of freight from customer to retailer.

(3) The cost of placing property in a special ''assemble and hold'' area.

(4) Costs to issue credit memo to the customer.

(5) Costs to obtain authorization from the supplier for the return of the merchandise.

(6) Costs of sending merchandise to the supplier.

The above items are illustrative only and not all inclusive. 2/3/75.

490.0088 **Returned Merchandise Deduction.** For purposes of Regulation 1655(a), a retailer has given ''credit'' for returned merchandise at the time the credit is entered on his books and the customer is notified in writing that the

RETURNS, DEFECTS, ETC. (Contd.)

credit is available for use. It is not necessary for the retailer to wait until the credit has been used by the customer in order to claim the deduction on the retailer's tax return. 8/1/60. (Am. 2000–1).

490.0090 **Returned Merchandise Deductions.** A retailer sells paint to a customer who is a commercial painter. The paint delivered was incorrect which resulted in a loss of time on the job by the customer. The retailer issues a credit memo for the paint plus an amount to cover the customer's loss of time. Only the portion of the credit allocable to the return of the paint is deductible from gross receipts. The amount credited for the loss of time did not result in a bad debt, defective merchandise, or returned merchandise deduction. 6/21/72.

490.0091 **Returned Merchandise Deduction—Conditions.** A firm purchases equipment for its own use and uses it. Later it begins negotiations with a third party lender to enter into a sale and leaseback transaction that will not qualify as a financing transaction nor as an acquisition sale and leaseback. The third party lender suggests that, instead of a sale and leaseback, the firm should arrange with the original vendor to ''return'' the equipment in exchange for a full refund of the original purchase price. The reason the vendor would be willing to refund such amounts is that the third party lender would agree to purchase the equipment for the original purchase price, that is, the amount refunded to the firm. The third party would then lease the property to the firm. The reason for structuring a transaction that otherwise constitutes a sale and leaseback in this fashion is to attempt to qualify for the returned-merchandise deduction.

The original vendor in this transaction is not entitled to a returned-merchandise deduction. A retailer is entitled to a returned-merchandise deduction when, upon return of the property by the purchaser, the retailer refunds the entire purchase price, plus sales tax reimbursement or use tax, and the purchaser is not required to purchase other property at a price greater than the purchase price of the returned property. The retailer is not entitled to the deduction if it imposes other conditions on the refund. For example, no deduction is allowed if the retailer conditions the refund on the purchaser's obtaining a new buyer for the property. Thus, when a retailer will ''refund'' the original purchase price only if the purchaser arranges for a new buyer to purchase the property at that same original purchase price, notwithstanding that at that time the fair market value of the property may be less than the original purchase price, the retailer is not entitled to a returned-merchandise deduction. 5/12/95.

490.0092 **Sale and Leaseback.** Vendor sold equipment to consumer in October. Sales tax was paid on the transaction. In December, after having made functional use of the property, consumer contracted to sell the equipment to lessor and lease it back. At that time, consumer gave vendor a resale certificate, and vendor credited consumer for the amount of ''sales tax'' included in the original purchase price. Lessor then paid the balance of the invoice to vendor, without payment of any tax or tax reimbursement, and then made a timely election to report tax on rentals payable. The vendor thereafter filed a claim for refund for the sales tax it had paid the Board on its sale to consumer.

RETURNS, DEFECTS, ETC. (Contd.)

Even if there were a valid issue as to whether consumer's sale to lessor qualified under section 6010.65 or Regulation 1660(a)(3), this issue is irrelevant in determining whether the original sale is subject to tax. Vendor did not take a timely resale certificate. Since consumer functionally used the property prior to selling the property to lessor, vendor's sale to consumer cannot be regarded as a sale for resale. The vendor cannot claim a returned merchandise deduction under these facts. There must be an unconditional return of the property to the vendor and a full refund of the purchase price. Here, the vendor simply accommodated the consumer, acting as a conduit, by billing the amount remaining due to lessor. Regardless of the documentation the parties might create in order to make the transaction appear to be a return of property followed by a sale to someone else, in fact, there has been no return at all. Even if this type of transaction could be viewed as a return, the vendor accepted that ''return'' only on the condition that the purchaser furnish a replacement buyer at an equal or greater price than the original purchase price. This cannot qualify for the returned merchandise deduction, and the claim for refund must be denied. 9/28/93. (M99–1).

490.0093 **Sale of Auto.** A purchaser of a new automobile sued the dealer and manufacturer for rescission of the purchase and sales agreement, alleging breach of warranties because the automobile had many defects. The parties entered into a settlement in which they agreed that the purchaser could receive a refund of the purchase price or could credit that amount towards the purchase of another automobile which would cost an additional $1,000.

If the purchaser chooses the credit, the sale of the second automobile is subject to tax and the credit is regarded as a trade-in allowance for the first automobile. The provisions of Regulation 1655, Returned Merchandise and Defective Merchandise, apply only to transactions voluntarily entered into between the buyer and seller and not to those transactions entered into which are forced by litigation. 10/25/90.

490.0095 **Settlement of Litigation.** When a return of merchandise and a refund of money is made in settlement of litigation, the returned merchandise deduction is not applicable. The amounts returned to a purchaser pursuant to a settlement are in the nature of damages which do not differ in any realistic sense from any other damages paid by the seller as a result of wrongful actions in the conduct of the transaction. 5/3/90.

490.0100 **Storing Property on Seller's Behalf,** amounts to returning merchandise if other conditions are met. 3/27/51.

(2) ''FULL SALE PRICE''

490.0120 **Automobile Registration and License Fees.** An automobile is returned to the selling dealer. The dealer returns to the purchaser the purchase price of the automobile and sales tax reimbursement, but not the registration or license fees.

The dealer would be regarded as returning the full price of the vehicle despite the fact that the dealer retains the license and registration fees. Such fees are not considered to be part of the sales price of the vehicle for sales tax purposes. 4/16/76.

RETURNS, DEFECTS, ETC. (Contd.)

490.0128 **Cost of Trip not Refunded.** A retailer is engaged in the business of locating new and used machinery for sales to prospective customers. Six machines were located in a distant city. The retailer and the prospective customer journeyed to the distant city to inspect the machines. The prospective customer purchased the six machines with the understanding that they could be returned. The machines were returned and the purchaser was credited for the return less freight and handling and the cost of the trip to the distant city.

In this situation, a deduction for returned merchandise is not allowable since the full sales price as set forth in Regulation 1655(a) was not refunded to the purchaser. Refund or credit of the entire amount is deemed to be given when the purchase price, less rehandling and restocking cost, is refunded to the customer. The cost of the retailer's journey to the distant city is not a rehandling and restocking cost. 9/17/71.

490.0160 **Overhead Cost.** A sells to B two machines. One is sold for $153,757 plus $9,994.21 tax and the other is sold for $155,125 plus $10,083.13 tax. The total price is $328,959.34 (which reflects a 5% quantity discount). B returns one machine. In calculating the refund A recalculates the sales price of the machine retained, but the sales price used does not reflect the 5% quantity discount. The difference between the recalculated amount and the total original sale represents the credit (5% quantity discount) allowed.

The returned merchandise deduction is not allowable under these circumstances. Regulation 1655(a) provides that only rehandling and restocking charges may be deducted. In this case the amount deducted from the original sale is not rehandling or restocking. 2/6/90.

490.0180 **Rental Charge.** When a sale of equipment is rescinded and a rental is substituted as a charge for use of the equipment, no refund is allowable. A charge for usage or ''rent'' is inconsistent with the requirements of Section 6012 that for a returned merchandise deduction there be a return of the ''full sale price.'' 5/17/57.

490.0200 **Repossession.** Sale of a freezer and a substantial amount of food on a conditional sales contract was made with a down payment which was less than the price of the food. Upon default in payment of installments, seller repossessed the freezer within 90 days, but could not repossess the food. Seller contended that by foregoing the balance owed on the contract he had returned the full sale price of the freezer to the purchaser. The contract was silent as to the application of the down payment toward either the freezer or the food.

Under these circumstances, down payment is applied pro rata to the sale price of each and the seller has not refunded the full price of the freezer. 11/19/53.

490.0220 **Rescission of Sale.** Where, by mutual agreement, a sale of assets is rescinded and assets are returned to seller, the original sale remained taxable by reason of the fact that the seller retained portions of the purchase price. 12/14/53.

RETURNS, DEFECTS, ETC. (Contd.)

490.0223 **Restocking is Service.** In order to qualify for a returned merchandise deduction, the retailer must refund the full retail selling price less any restocking charges. The charge for restocking returned merchandise is a charge for service and is not subject to tax. The retailer must refund the full sales tax reimbursement, not merely the tax on the net amount of the credit after the restocking charge. 6/24/88.

490.0228 **Returned Merchandise.** Property was purchased from a retailer with tax reimbursement added to the price. It was subsequently returned to the manufacturer's service center because of unsatisfactory performance. Being unable to cure the defect to the customer's satisfaction, the manufacturer refunded the purchase price to the customer, but did not refund the amount of sales tax reimbursement. Under the Sales and Use Tax Laws, the manufacturer was not required to refund the sales tax reimbursement to the customer.

In addition, neither the manufacturer nor the retailer are entitled to a returned merchandise deduction because the deduction is only available to the retailer if the retailer refunds the entire sale price and sales tax reimbursement to the purchaser. 2/13/90.

490.0233 **Returned Merchandise v. Trade-In.** The elapsed time between the sale and return of merchandise has no bearing on a returned merchandise deduction if full credit, including tax reimbursement, is given to the customer and the customer is not required to purchase merchandise at a greater price in order to receive credit. If the full purchase price is refunded, the Board must look to the taxpayer's policy and past practices to determine if there is any proof that the merchandise is traded in rather than returned. 3/19/91; 5/14/96.

490.0240 **Salesman's Commission,** where that is charged customer despite the return of merchandise the full sales price is not returned and accordingly a deduction may not be taken. 4/14/52.

490.0260 **Special Order Merchandise—Returned.** Charges made to a retailer by a manufacturer for the return to the manufacturer of special order merchandise returned for credit by a customer should be regarded as part of the retailer's restocking and rehandling costs. 4/6/65.

490.0280 **Subsequent Billing for Charges.** In order for a retailer to be entitled to a deduction on account of merchandise returned, Section 6012 of the Sales and Use Tax Law requires that the ''full sale price'' be refunded. Where the credit memorandum indicates a refund or credit of the full sale price followed, however, by a billing for a charge designated as delivery, use, or rental, it would appear that in substance the requirements of the statute have not been complied with, regardless of whether the billing is designated as a delivery charge, usage charge, or rental. The fact is that a charge is made to the customer on account of the transaction resulting in the return of merchandise which in substance and effect is not to refund credit to the customer the ''full sale price'' as required by Section 6012. The fact that tax may have been paid measured by the amount of this delivery, usage, or rental charge does not alter the fact that the customer has not

received a refund or credit of the full sale price. Whether the customer purchases other merchandise or not would appear immaterial since he pays the full price of the replacement merchandise plus the charge made on account of having returned the original merchandise. If the customer had originally been charged for the delivery of the merchandise and if title to the merchandise had passed to the customer prior to delivery so that under Section 6012 the delivery charge would not be a part of taxable gross receipts, then failure to refund the delivery charge would not prevent the taking of a deduction for returned merchandise. 11/7/51. (Am. 2002–2).

490.0300 **Tax Reimbursement.** An automobile is purchased with the requirement that it contain a certain type of transmission. Delivery is made of a vehicle containing a different type of transmission and the dealer agrees to and subsequently delivers a used automobile of the same year and model containing the transmission desired. Total sales price remains unchanged, the contract being altered only to reflect that it covered the second car.

The second transaction is taxable, but at the same time, retailer is entitled to a returned merchandise deduction which would offset the tax on the second transaction, provided he refunds or credits the purchaser for the amount of tax reimbursement charged on the first transaction. 4/19/54.

490.0320 **Trading Stamps.** A customer purchases a $2 article paying 6¢ sales tax and is also given trading stamps which cost the seller 5¢ and which cost is deducted from gross receipts as a cash discount.

The customer returns the merchandise but is unable to return the trading stamps. The seller therefore charges the customer 10¢ for keeping the stamps, and refunds to the customer $1.96.

The amount of cash discount is the amount paid by the retailer for the trading stamps. Under the example above, the original selling price of the article was, accordingly, $2.01 and, unless that amount is refunded, the deduction for returned merchandise should not be allowed. 7/17/53.

490.0325 **Trade-In of Defective Aircraft.** A California firm purchased a new 1982 aircraft directly from the factory and paid the California use tax on the purchase price of $490,000. About a year later, the aircraft was found to be defective which made it unsafe and unsuitable for the purchaser's use. The purchaser reached an agreement with the manufacturer that the aircraft could be returned. The manufacturer and purchaser agreed that a new 1984 model aircraft would be substituted for the defective older aircraft. The purchaser was required to pay the manufacturer an additional $60,000 which reflected the difference in value between the defective aircraft $490,000 and the new aircraft which was $550,000.

The transaction will not meet the returned merchandise deduction requirements unless the vendor refunds the full purchase price of the original aircraft and does not require the purchase of a replacement greater than the value of the credit given. From the facts presented in this case, the buyer is required to purchase an aircraft of greater value in order to obtain the deduction.

RETURNS, DEFECTS, ETC. (Contd.)

Based on the foregoing, the purchaser would be liable for use tax on this transaction measured by $60,000 plus the trade-in value of the aircraft. The only amount which may be excluded from the $550,000 sales price of the new aircraft is the amount which the seller allows or credits against the sales price on account of the defects in the 1982 aircraft. If no allowance or credit was given on account of the defects, no deduction could be taken against the sales price. Of course, the amount of the allowance or credit for the defect must be reasonable and records must be kept to substantiate the allowance or credit. 1/16/85.

490.0340 **Transportation Charges.** In order for a lumber retailer to claim a returned merchandise deduction, he must refund the ''full sale price.'' Since transportation charges to the buyer by carrier are no longer includable in the measure of tax irrespective of where title passes, they need not be refunded in order to claim the deduction. Thus, ''full sale price'' for purposes of the returned merchandise deduction should be construed to include only amounts required to be included in the measure of tax under Sections 6011 and 6012. 11/30/64.

490.0380 **Transportation Charges.** Deductions for returned merchandise should be disallowed where the seller fails to refund or credit that portion of the sales price represented by delivery charges occurring prior to the sale as well as the tax thereon. The delivery charges referred to are for the delivery of the goods to the customer and not for retaking it.

An additional charge for retaking the goods would not prevent the allowance of the deduction, provided the conditions specified in Regulation 1655. 9/1/53.

490.0400 **Unused Portion Returned.** If the seller refunds the amount of the sales price and sales tax attributable to the unused portion of paint returned by the purchaser, the seller may exclude from the measure of his tax liability the sales price of the returned merchandise. 6/24/57.

(b) REPLACEMENTS GENERALLY—MAINTENANCE CONTRACTS
Leases, see also Leases of Tangible Personal Property—In General.

490.0420 **Agency.** The dealer actually furnishing the replacement may be regarded as the agent of the dealer who sold the car, and the sale to such agent may be regarded as a sale for resale. 10/22/52.

490.0429 **Bundled Hardware and Software Maintenance Contract (Optional).** A contract for optional hardware maintenance is not a contract for the sale of tangible personal property and no sales or use tax applies to the charge. On the other hand, a contract for software maintenance under which the customer will receive updates or error corrections on tangible media is a contract for the sale of tangible personal property. Furthermore, if a software maintenance contract includes a mandatory charge for consultation, that charge is included in the measure of tax from the sale of the software maintenance contract. Therefore, when a bundled contract includes a software maintenance portion and a hardware maintenance portion, the charge for the hardware portion of the contract is

nontaxable. The contract should be prorated between the taxable software maintenance portion and the nontaxable hardware maintenance portion of the contract. 7/15/96.

490.0430 **Bundled Optional Maintenance Contract.** A taxpayer is engaged in the business of selling lump-sum optional maintenance contracts for office computer printers. The taxpayer does not sell the printers. One of the types of optional maintenance contracts the taxpayer sells is a ''bundled optional maintenance contract.'' Under this contract, the taxpayer maintains the printers, including repair labor and new parts to maintain the printers in working condition. In addition, the taxpayer provides new disposable toner/ink cartridges for the printers as needed. The contract is sold for fixed monthly, quarterly, or yearly amounts, and the fixed amount does not fluctuate due to the volume of either parts or cartridges needed.

The taxpayer's contract to maintain the printers and to provide new disposable toner/ink cartridges for the printers is the sale of both an optional maintenance contract and of tangible personal property (the toner/ink cartridges) for a lump-sum price. The sale of the optional maintenance contract is not subject to tax. The taxpayer is the consumer of the parts and material furnished in the performance of maintaining the printer in working condition and tax applies to the sale of such items to the taxpayer, or to its use of such property. On the other hand, the toner/ink cartridges are not regarded as materials consumed by the taxpayer in maintaining the printers. Rather, they are sold by the taxpayer and those sales are subject to tax.

An allocation between the taxable and nontaxable charges must be made. Therefore, the taxpayer should segregate on the invoice to its customer, and in its records, the taxable fair retail selling price of the toner/ink cartridges from the nontaxable charges for the optional maintenance contract. 8/26/96.

490.0432 **Bundled Optional Maintenance Contracts—Printers.** A taxpayer offers two types of optional maintenance programs for printers. One provides for the necessary parts and labor to maintain the printer (standard maintenance contract). The other provides for both the standard maintenance contract and also includes disposable toner/ink cartridge as needed. The latter contract is referred to as the ''bundled optional maintenance contract.''

The seller of the maintenance contract is the consumer of parts and materials used to maintain the printer under both contracts. However, it is the retailer of the toner/ink cartridges furnished under the ''bundled maintenance contract.'' The taxpayer should segregate the retail selling price of the toner/ink cartridges in its invoices and its records. 8/26/96.

490.0440 **Credits.** Credits granted by a manufacturer to a car dealer reducing the dealer's purchase price of replacement parts to an amount equivalent to the purchase price paid by an independent warehouse distributor were held not to represent consideration received for sales where the making of sales at reduced prices to fleet operators normally serviced by distributors was a condition of the adjustment of the purchase price of the parts. 3/14/69.

RETURNS, DEFECTS, ETC. (Contd.)

490.0460 **Lemon Law—Auto Leases.** Although an auto manufacturer is required by the California Lemon Law to repurchase defective vehicles sold or leased to consumers, it is not entitled to refunds of use tax paid back to lessees on such repurchases. Civil Code section 1793.25 was added to the Lemon Law to require the Board to reimburse the manufacturer for sales tax which was included in making restitution to a consumer under the Lemon Law, if the dealer had paid the sales tax on the original retail sale of the subject vehicle. This section pertains only to refunds of sales tax, precluding the granting of refunds of use tax. However, a lessee may obtain a refund of use tax if he received a credit on rentals in accordance with Regulation 1655. The provisions of Regulation 1655 are applicable to leases which are ''continuing sales.'' 7/31/90.

490.0477 **Optional Service Contract—Replacement Units.** Under an optional service contract, a firm provides next day delivery of a replacement unit for any failed equipment. The repair shop is located outside of California. The replacement unit becomes the customer's property and the customer's unit becomes the firm's property. The unit which is replaced is repaired and becomes part of the replacement inventory. If the unit replaced is not found defective, the customer is charged. The division providing the replacements is located outside of California. The contract falls within the purview of Regulation 1546(b)(3)(C). The firm is the consumer of property used to fulfill its obligations under the contract. Since the firm completes its obligation under the contract when the replacement unit is delivered to the carrier the ''use'' occurs outside of California. Since no use occurs in California, no use tax is due.

If the unit is not defective and a charge is made, the firm must collect use tax on exchange units shipped to California. 8/5/88.

490.0480 **Real Property, Repairs to.** Lubrication under elevator maintenance contracts is repair to realty and the contractor is the consumer of the oil and other materials used. 1/30/50.

490.0483 **Repair Parts Purchased for Warranty Repairs.** Parts and materials furnished in connection with the performance of mandatory warranties are regarded as sold to the customer as part of the original sale and may be purchased for resale. Parts and materials furnished in connection with the performance of optional warranties are regarded as consumed by the seller. If the seller purchases parts and materials which may be sold or may be consumed and it is unknown at the time of purchase which will be sold, the seller may purchase all such parts and materials for resale. Tax will be due when parts and materials are withdrawn from inventory for consumption. However, parts properly purchased for resale and thereafter used outside the state on optional warranties are not subject to tax pursuant to section 6009.1. If the parts used on optional warranties are of a kind which may not be purchased for resale, the sales tax is applicable to sales to the warrantor notwithstanding that some of the parts may be used outside the state. The warrantor may not issue a resale certificate for such parts. 4/27/94.

RETURNS, DEFECTS, ETC. (Contd.)

(c) WARRANTIES

Watch repairmen, see also Miscellaneous Repair Operations.

(1) IN GENERAL

490.0495 **Appliances Warranties.** A California appliance service company is hired by an out-of state firm to do appliance repairs in California to fulfill the out-of-state firm's obligations under an optional warranty.

The out-of-state firm is the person obligated to repair the appliance under the optional warranty contract. Thus, it is the consumer of, and must pay tax on, all parts and materials purchased. It is not proper for the out-of-state firm to provide the appliance service company a resale certificate. The service company is the retailer of the parts sold to the out-of-state firm. 12/21/92.

490.0500 **Automobile Warranty.** Replacement parts purchased ex-tax and furnished to automobile purchasers under a factory warranty are not subject to sales tax at the time they are installed in the vehicle, since the tax paid at time of sale of vehicle includes the replacement parts under the warranty. Neither is use tax due on such warranty parts. 10/31/63.

490.0510 **Automobile Warranty.** The unexpired portion of a new car warranty, which a second retail purchaser of the car receives by paying a $25 transfer fee and which is subject to a $25 deductible clause, is a continuation of the original mandatory warranty. Amounts billed to the manufacturer for parts and the $25 transfer fee are not subject to sales or use tax. The pro rata portion of the $25 deductible charge allocable to parts is subject to sales tax. 10/22/71.

490.0510.200 **Automobile Warranty—$100 Deductible.** When a new car warranty is subject to a $100 deductible clause, the $100 deductible is taxable in accordance with the ratio of parts to labor. 5/15/90.

490.0510.350 **Buyer's Warranty.** A California resident purchased from an Arizona dealer a boat manufactured by a company in Wisconsin. After the purchase, the buyer discovered a crack in the boat. The Wisconsin company agreed to have the crack repaired under a buyer's warranty (i.e., mandatory warranty included in the selling price). The boat was taken to a boat repair shop in California.

Since the crack was repaired under a mandatory warranty, there is no tax owing on the purchase of parts either by the repairer or the manufacturer. The furnishing of parts by the repairer would be a nontaxable sale for resale. The purchaser paid use tax on the purchase price of the boat, including the mandatory warranty, at the time it was registered with DMV. 3/10/92.

490.0510.925 **Lemon Law—Boat Replacement.** The provisions of the California Lemon Law do not apply to the sale of boats. However, the manufacturer or the dealer of the boat may be obligated under a warranty with the customer to replace a defective boat.

RETURNS, DEFECTS, ETC. (Contd.)

When a boat is replaced pursuant to a mandatory warranty, the person obligated under that warranty is regarded as purchasing the replacement boat for resale. No tax is due with respect to the transfer of the replacement boat to the customer because the replacement boat is regarded as having been sold as part of the original sale subject to the mandatory warranty. This is true whether the person obligated under the warranty is the dealer or the manufacturer. Thus, if the dealer is the person obligated under the mandatory warranty and it removes a boat from resale inventory to replace a defective boat, no tax applies to the transfer of the replacement boat to the customer. When the manufacturer is the person obligated under the mandatory warranty, the manufacturer generally purchases the boat from the dealer (i.e., it purchases a boat back that it had sold to the dealer for resale). The manufacturer then instructs the dealer to deliver the replacement boat to the customer on the manufacturer's behalf. The manufacturer is purchasing the boat from the dealer for resale, and no tax applies to the manufacturer's transfer of that replacement boat to the customer.

On the other hand, if the warranty is optional, the entity obligated under the warranty is the consumer of that boat. The sale to that person, whether it is the seller or the manufacturer, is the taxable retail sale.

If the customer pays a "slight price increase" (i.e., the difference in price between a 1994 and 1995 boat), the increase is subject to sales tax whether the warranty on the boat is mandatory or optional and whether the warranty is from the seller or the manufacturer. 8/7/95.

490.0511 **Lemon Law—Business Vehicles.** The Lemon Law does not apply to vehicles purchased primarily (more than 50 percent of the time) for business purposes. 5/17/94.

490.0511.100 **Lemon Law Effects on Residual Portion of Warranty.** If an automobile manufacturer provides that a new car express warranty is available to a subsequent purchaser of a vehicle and that the purchaser is entitled to utilize service and repair facilities in the same manner as is available to the original purchaser, the vehicle will be regarded as a "new motor vehicle" for purposes of the lemon law. 3/6/95.

490.0512 **Lemon Law Reimbursement.** A manufacturer who claims a refund for tax paid with respect to a vehicle returned under the Lemon Law must pay full restitution in order to qualify for the refund. Restitution must include any transportation charges and manufacturer-installed options, and any collateral charges such as sales tax reimbursement, license fees, registration fees, and other official fees. The amount also includes any incidental damages to which the buyer is entitled, including but not limited to towing, reasonable repairs, and car rental costs. The amount excludes non manufacturer items installed by a dealer or the buyer.

If there is no breakdown of what is being reimbursed, the manufacturer's claim may be granted if the purchaser was reimbursed in excess of the amount computed by the Board as being required restitution. 5/17/94.

RETURNS, DEFECTS, ETC. (Contd.)

490.0512.300 **Lemon Law Reimbursement—Court Settlement.** A customer purchased a new vehicle from a new car dealer for her personal and family use. About a year after purchasing the vehicle, the customer filed a complaint against the dealer and distributor of the vehicle in a Superior Court in California. In the complaint, the customer alleged that she began experiencing numerous problems with the vehicle and that the vehicle was defective. The complaint further alleged: (1) breach of implied warranty under the Song Beverly Act, Civil Code Section 1792; (2) breach of express warranty under the Song-Beverly Act Lemon Law, Civil Code Sections 1793.2(d) and 1794; (3) breach of obligation imposed by the Song Beverly Act; and (4) against the dealer only—negligence in repair.

The parties subsequently entered into a settlement agreement which provided that the customer would release any interest that she had in the vehicle and dismiss her complaint and to release the distributor and the dealer from any claims, demands, actions, etc., asserted in the lawsuit or otherwise relating to the vehicle. In return, the distributor agreed to pay the customer the amount paid for the vehicle less an amount for damage to the vehicle. The distributor also agreed to pay the attorney fees and costs of the customer. The settlement agreement also provided that it was a compromise of a disputed claim and that the execution of the agreement and payment of the consideration would not be deemed to be, nor construed as, an admission of an inability to service or repair the vehicle, as admission of a breach of warranty, or as admission of any other liability to the customer. The distributor of the vehicle then filed a claim for refund of sales tax reimbursement that it refunded to the customer under the California Lemon Laws.

A manufacturer is entitled to a refund under Civil Code Section 1793.25(a) if the payment made to the customer is restitution under Civil Code Section 1793.2(d)(2)(B). The fact that provisions in the settlement agreement state that the manufacturer does not admit any nonconformity or failure to comply with the repair, disclosure, or warranty requirements of Civil Code Section 1793.22(f)(1) does not preclude a finding that the settlement was pursuant to the Lemon Law and thereby prevent a refund to the manufacturer under Civil Code Section 1793.25. In this case, it can be reasonably inferred from the facts that the payment made to the customer was restitution under Civil Code Section 1793.2 (d)(2)(B) and, thus, the refund should be allowed. 10/13/95.

490.0513.075 **“Lemon Law”—Taxability of Mileage Charge.** Under the ‘‘Lemon Law’’ the manufacturer must pay an amount equal to the actual price paid or payable by the buyer, including any sales tax and any incidental damages to which the buyer is entitled. The manufacturer may deduct for usage of the defective vehicle and the amount must be deducted from the original vehicle selling price before calculating the sales tax refund. In other words, the ‘‘charge attributable to use’’ is subject to tax. Any refund or credit for sales tax previously paid is limited to the net amount of the credit or refund after the ‘‘charge attributable to use.’’ 7/12/93.

RETURNS, DEFECTS, ETC. (Contd.)

490.0515 **Optional Warranties.** Optional warranties may be provided by other than the seller of the property. A repairer who enters into a warranty contract which is not required as part of the sale of tangible personal property is providing an optional maintenance contract under Regulations 1546(b)(3) and 1655(c)(3) whether or not that person was also the seller of the property for which the warranty is issued. That person is the consumer of materials and parts furnished in performing the repairs and tax applies to the sale of such property to the repairer or to the use by the repairer of that property. 8/23/90.

490.0515.010 **Optional Warranties.** A seller of equipment also sold optional lump-sum maintenance agreements to its customers. This seller then subcontracted the actual maintenance work, also for a lump-sum amount. Irrespective of whether the optional maintenance agreement was purchased from the seller of the equipment or from some other party, the sub-contractor actually doing the repair work is the consumer of the parts used because that sub-contractor was performing repairs under the optional maintenance agreement it sold. 10/21/88.

490.0516 **Repair and Service Contracts.** Company A installs, services, and repairs computer disks which are manufactured by B, a related corporation. B sells the disks it manufactures to original equipment manufacturers (OEMs) for incorporation into computers sold to consumers. The OEMs and their dealers provide warranties to the consumers of the computers. These warranties may be included in the sales price of the computer (i.e., mandatory warranties) or may be optional warranties. The OEMs and dealers may, in turn, contract with A to perform necessary repairs.

If A's contract with the OEMs and dealers provides that A is reimbursed based on repairs actually performed, whether on a time and material basis or on a standard amount per unit actually repaired (general repair contracts), the type of warranty between the OEMs/dealers and the end customer is relevant. Whether A is a seller or a consumer of the parts and materials furnished is determined under the general rules of Regulation 1546 (b). When A is the seller, it is making a sale for resale if the repairs are pursuant to the OEM's or dealer's mandatory warranty; A is making a taxable retail sale when the repairs are pursuant to an optional warranty.

However, when A's contract with OEMs and dealers provides that A (who is not the seller of the computer disks to the OEMs or dealers) is reimbursed on a flat fee basis (e.g., A is paid a fixed amount for each warranty which it undertakes to fulfill, or a lump-sum annual fee based on units sold), the maintenance contract between A and the OEMs/dealers is considered an optional warranty or maintenance contract. As such, A is the consumer of the parts and materials furnished. This would be true whether the OEMs' or dealers' warranties with their customers were optional or mandatory. 8/23/90.

490.0517 **Replacement of Motorhome—"Lemon Law."** When a manufacturer replaces a motorhome pursuant to Civil Code Section 1793.2, more commonly known as the ''lemon law,'' the replacement motorhome is considered

a ''replacement under warranty.'' The tax liability is measured by any amount that customer pays in excess of the credit received. If the value of the replacement property is less than the credit received for the original property, the customer must be refunded the difference, including applicable sales tax reimbursement.

Replacement pursuant to litigation qualifies for this treatment only if it satisfies all the requirements of Civil Code Section 1793.2. Thus, the manufacturer would be required to pay, or to reimburse the buyer, for the amount of any license, registration or other official fees which the buyer is obligated to pay in connection with the replacement of the motor vehicle portion of the motorhome. Otherwise the replacement of the motorhome does not come within the provisions of Civil Code Section 1793.2, and the transfer of the replacement would be considered a taxable sale. 5/14/90.

490.0520 **Returned Merchandise.** Where a small loader was exchanged for a larger one pursuant to express and implied warranties give on the sale of the smaller unit, a returned merchandise deduction is proper. The buyer has an election of remedies upon breach of warranty, one of which was the return of the purchase price. Therefore, the conditions requiring refund or credit for the full purchase price and the buyer not required to purchase an item of equal or greater value are met. 6/9/65.

490.0530 **Road Hazard Warranties—Tires.** A tire retailer has an optional road hazard warranty on new tires. This warranty only covers road hazards such as running over a piece of glass and has nothing to do with defects in the materials. When a customer comes in with a road hazard claim, the amount charged the customer would be a pro-rated amount based on the remaining percentage of tread left on the old tire. If the tire can be repaired, it would be repaired without cost to the customer.

Since the warranty is optional, the retailer is the consumer of parts and materials furnished in the performance of the warranty, and sales or use tax applies to the sale of such items to the retailer, or to the use of such property. Thus, when the retailer provides its customer with a new tire under the optional warranty, the retailer must report and pay use tax on the cost of that portion of the tire covered by the warranty and report the pro-rata charge to its customer as a taxable sale. 2/6/95.

490.0540 **Solicitor (or His Assignee), of Warranties,** not sold originally with sets, is consumer of parts or materials furnished pursuant to such warranties. 4/25/51.

490.0560 **Television Sets.** Under a lump-sum agreement the picture tube of a used television set is replaced, the balance of the set is overhauled, new parts installed where needed, and the parts and labor are guaranteed for one year. The repairer is the retailer of whatever parts are furnished, whether originally furnished or pursuant to the warranty. The transaction involves exempt repair labor. Sales tax applies to the sale price of the parts, same to be determined by the fair retail price of such parts. 10/21/55.

RETURNS, DEFECTS, ETC. (Contd.)

490.0563 **Third Party Service Repair Contracts.** A taxpayer located in California performs third party service/repair calls for customers. The taxpayer is hired by customers who are located out of state and have no employees in California. The taxpayer is hired to perform repairs on products which are covered by some type of maintenance agreements issued by its customers.

If the taxpayer's customers contract for the repairs because they are obligated pursuant to optional maintenance agreements, they are the consumers of the parts the taxpayer sells. Therefore, the taxpayer's sales of parts to them are retail sales and sales tax applies to such charges for those parts. If taxpayer's customers are obligated pursuant to mandatory maintenance agreements, they are the retailer's of the parts they purchase. Thus, taxpayer's sales of the parts to them are nontaxable sales for resale.

When the repair service is performed on office equipment owned by the federal government, the application of the tax is the same as explained above. Although sales of tangible personal property directly to the United States are exempt from sales tax, this exemption does not apply here since the taxpayer will not be making the sales to the United States. Rather, taxpayer's sales of the parts are to the out-of-state customer under either an optional or mandatory maintenance agreement. (Regulations 1546(b)(3)(A) and 1655(c)(1).) 1/28/94.

490.0571 **Optional Maintenance Contracts.** The repairer is the consumer of tangible personal property used in the performance of optional maintenance contracts on property owned by the U.S. government, even if the contract contains a title clause declaring that title passes to the owner of the item being repaired upon installation to that item, and even if the repairer makes no use of the property other than installation to the item being repaired. 8/22/90; 5/29/96.

(2) WARRANTY CHARGES—WHEN INCLUDABLE IN TAX MEASURE

490.0580 **Insurance.** Warranty insurance charges, if required from the customer at the time of sale, form part of the purchase price and are subject to sales tax; if the insurance is optional, the charges are not part of the sales price and no tax is due. 12/13/63.

490.0583 **Mail Order Form—Preprinted Insurance Charge.** When a retailer who sells property via mail order preprints a charge of $1.50 for insurance on a separate line in the total column on its order form, the charge is includable in the measure of tax as a mandatory charge. The fact that some customers may cross out the charge and refuse to pay it does not make it optional. For a charge to be truly optional for purposes of the Sales and Use Tax Law, the order form must clearly and unequivocally state that the charge is optional and may be crossed out by the customer. 10/2/97. (M98–3).

490.0585 **Maintenance Contract—Optional v. Mandatory.** The fact that a purchaser with significant economic power is able to lease property without a maintenance contract is not indicative of whether a maintenance contract is optional or mandatory. A seller may have different policies for preferred

RETURNS, DEFECTS, ETC. (Contd.)

customers. If non-preferred customers are required to contract for a maintenance contract, such contracts are mandatory and part of the gross receipts. 12/18/92.

490.0600 **Manufacturer.** A warranty issued by a manufacturer of appliances for which a charge is made to the retailer who passes the charge along to the customer, the amount of the charge is included in the measure of tax as an integral part of the sale, and is subject to the tax. (Distinguished from optional television warranties.) 12/19/52.

490.0620 **Parts Furnished by Dealer Under Used Car Warranty.** An automobile dealer sells optional warranties to purchasers of qualified used cars on behalf of the manufacturer of the cars. The premiums are paid over to the manufacturer. When a purchaser makes a claim on the dealer for service under the warranty, he is required to pay the dealer a maximum of $25. The dealer performs the warranty work, making out an invoice with separately stated charges for parts and labor, which he submits to the manufacturer. The manufacturer pays the dealer the amount of the billing, less the $25 paid by the purchaser. Under such circumstances, the original premium paid by the purchaser for the warranty is not part of the dealer's taxable gross receipts. The dealer, however, is the retailer of the parts furnished under the warranty and sales tax is applicable to the selling price of such parts. 11/30/66.

490.0630 **Performance Bonds.** A taxpayer manufactures and sells fire trucks. Some buyers require the taxpayer to obtain performance bonds in order to assure that the trucks perform to specification. The bond is in the taxpayer's name. The cost of the bond is passed on the buyers as a separate charge on the invoice.

Since the bond is not required by the taxpayer as a condition of the sale, the charge is regarded as a charge for an optional warranty. The charge passed on to the buyers is not subject to tax. 2/23/95.

490.0660 **Service Guarantees on Automobiles.** The sale of automobile guarantees as a part of the sale of the automobile it warrants should be treated for tax purposes in the same manner as are television warranties, that is, any amount charged for the warranty should be included in the taxable measure. However, when the warranty is sold on a strictly optional basis, the tax does not apply. The sale of parts by the repairman to the guarantor are considered as being made to a consumer and therefore taxable. 7/18/57.

490.0680 **Service Policies.** Where an appliance dealer sells a television service policy in the nature of an optional warranty (not mandatory upon purchaser), even if sold with the set, or as a ''second-year'' policy, it is a service contract not includable in taxable gross receipts. The dealer is regarded as the consumer of any parts used in performing this independent service. 5/21/54.

490.0700 **Service Protection Contract.** A separate charge for a service protection contract which is actually an optional labor and parts warranty, does not constitute taxable gross receipts from the original sale of an appliance. 5/10/60.

RETURNS, DEFECTS, ETC. (Contd.)

490.0720 **Service Warranty.** A mandatory charge for a service warranty on tangible personal property must be included in the gross receipts from the sale of the property, whether or not the charge is separately stated on the customer's billing. 5/12/66.

490.0727 **Software/Hardware Post-Warranty Service Agreement.** Taxpayer, in connection with sale of network computing products including workstations, servers, software and microprocessors, offers customers post-warranty services on a contractual basis after the initial product warranty has expired. The post-warranty support services are offered through a four level multi-tiered program. Each level of support is sold for a single price and provides the customers with bundled hardware maintenance, operating system enhancements, and specific software telephone/on-line support, including patches and enhancements.

Since the customers are offered an optional lump-sum service agreement for both hardware and software maintenance, the service agreement is regarded as both an optional maintenance agreement on the equipment as well as an optional maintenance agreement for the software. Tax does not apply to that portion of the ''hardware only'' support agreement which relates to actual hardware maintenance. However, tax does apply to that portion of the agreement which represents the charges for the maintenance of the operational programs (software) since such software maintenance agreements consist of providing updates in tangible form (on storage media) to a prewritten operational program. Tax also applies to charges for consultation services (i.e., technical support) related to the operational program maintenance agreement unless the consultation is optional and such fees are separately stated. [Regulation 1502(f)(1)(C).] 4/22/97.

490.0740 **Television.** The retailer of a television set who sells a parts warranty to the purchaser, which warranty is mandatory, is required to return the tax to the state on the total charge, inclusive of the charge for the warranty. The charge for the warranty is properly regarded as a part of gross receipts from the sale of tangible personal property and the tax does not apply with respect to the furnishing of replacement parts by the retailer pursuant to the warranty. The sale of such parts as are furnished pursuant to the warranty will be regarded as included within the original sale, and such parts may, of course, be bought by the retailer under a resale certificate and he does not become liable for the tax on the cost thereof.

In the event the parts warranty is optional, the seller of the warranty should be treated as the consumer of such parts, materials, and supplies as he may furnish under the warranty subject to tax measured by the purchase price of such parts, materials, and supplies to him. 5/20/50.

(d) DEFECTIVE MERCHANDISE

490.0745 **Automobiles.** A dealership sells a new vehicle and collects sales tax reimbursement from the customer. After several repairs, but short of meeting what the dealer believes to be the Lemon Law requirements, the customer requests that the manufacturer refund the purchase price without legal litigation.

RETURNS, DEFECTS, ETC. (Contd.)

The manufacturer, through the dealership, refunds the purchase price and all applicable sales tax to satisfy the customer.

If the vehicle is defective and the dealer cannot repair it to conform to the applicable express warranties, the refund may nevertheless qualify as a lemon law restitution in accordance with subdivision (d) of civil code section 1723.2. The reasonable repair attempts requirement of the Lemon Law is an upper limit on how many times the manufacturer has attempted to repair the defect before the restitution and replacement provisions of the Lemon Law apply. It is not a lower limit on when the manufacturer and purchaser may agree that a Lemon Law defect exists.

The refunding may also qualify as a returned merchandise deduction. The main question to be answered is who contracted with the customer to make the refund. If the dealer made the refund literally on behalf of the manufacturer and the agreement for the refund was entered into between the manufacturer and the customer, no deduction for returned merchandise is available. On the other hand, if the person actually entering into the agreement to refund the money to the customer was the dealer and the dealer made the refund on its own behalf, the returned merchandise deduction is available if all of its requirements are satisfied. This is true without regard to any agreement between the manufacturer and the dealer for reimbursement to the dealer of the amount the dealer refunded to the customer. 6/19/95.

490.0748 **Defective Merchandise.** A refrigeration compressor which ultimately fails as the result of many years of productive use and not because of a defect inherent in it when it was first sold is not eligible for defective merchandise credit when it is turned in on the purchase of a replacement compressor, even though some credit may be allowed by the retailer. Such a credit would be in the nature of a trade-in which may not be deducted from the selling price of the replacement compressor. 1/28/69.

490.0750 **Defective Trailer.** A firm purchases a trailer in September 1992. The trailer was defective and after numerous attempts to fix the problem, the dealer agreed to replace it. A new trailer with a sales price of $18,105 was furnished. A credit of $9,400 for the ''trade-in'' was allowed. The manufacturer paid $8,705 on account of the defective condition of the first trailer. The firm paid $1935.55 which covered sales tax and registration fees.

The appropriate amount of sales tax due on the transaction is measured by the sales price ($18,105) less the amount credited by the manufacturer on account of the defective condition of the trailer ($8,705). The dealer should refund the excess tax reimbursement and file a claim for refund. 2/25/94.

490.0760 **Drilling Bits.** A retailer who sold a carbide-tipped bit which proved defective upon initial use, sold the customer a new bit, and subsequently refunded the entire selling price of the original bit, including sales tax reimbursement, was entitled to take a deduction for defective merchandise. Where the retailer sold a bit which the customer damaged after substantial use and subsequently sold the customer a new bit, giving credit for the selling price of the original bit, less a

charge for use thereof, the retailer was not authorized to take a deduction for defective merchandise under Regulation 1655 nor for returned merchandise under Regulation 1655. 12/17/64.

490.0780 **Lease With Purchase Option.** Equipment was leased with option to purchase, the lessor electing to report use tax measured by his rental receipts. When the lessee exercised his option, the lessor reported sales tax measured by the option purchase price. The equipment proved defective; the lessor replaced it, charging the lessee an amount equal to the original lease payment, plus option purchase price and giving full credit for the rental payments and option purchase price previously paid. Under such circumstances, the lessor was entitled to take the deduction for defective merchandise when he reported the sale of the replacement equipment. 7/2/65.

490.0800 **Trade-in Involved.** When an allowance is made for defective merchandise which is also accepted by the retailer as part payment on the purchase of other merchandise, the value of the merchandise traded in its defective condition must be included in taxable gross receipts. The retailer may claim a defective merchandise allowance, but must not include therein the trade-in allowance made for the merchandise. 11/12/64.

490.0820 **Trade-in Allowance.** A battery with a 24-month guarantee is purchased for $20 plus 60¢ tax. The battery fails at the end of 12 months. The customer returns the defective battery, worth $1 as junk, and is given a defective merchandise allowance of $10. A new battery is sold to the customer for $10 plus 30H tax. In computing gross receipts the retailer should regard the $1 junk value of the defective battery as a trade-in allowance and the remaining $9 as a defective merchandise allowance. In the alternative, the defective merchandise allowance could be regarded as $10 provided the trade-in value of $1 is added to the taxable gross receipts from the second sale. 6/25/58.

493.0000 REUPHOLSTERERS—Regulation 1550

493.0100 **Interior Decorating.** An interior decorator asked for interpretations of the application of tax to various charges:

(1) The estimate contracts for reupholstery do not list labor separately but repair and installation labor is identified on subsequent billings to the client.

Charges for repair and installation labor are not required to be separately stated on the estimate contract. However, if such charges are not separated on the final invoice to the client and the retail value of the parts and materials furnished in connection with repairs is more than ten percent of the total charge, the contractor will owe tax on the retail selling price of the parts and materials as well as fabrication labor. The retail selling price will be determined based on the evidence available.

(2) When reupholstering furniture, are loose back pillows considered part of a piece of furniture?

REUPHOLSTERERS (Contd.)

The pillows of a loose-pillow back piece of furniture are considered component parts of the furniture.

(3) Carpet remnants are purchased from carpet installers and the installers make them into an area rug. Is tax due on the remnant and the labor to fabricate the rug?

If an area rug made from carpet remnants is sold, tax applies to the entire charge for the rug including the charge for the labor to make the rug from the remnants. 4/26/92.

REWINDING MOTORS

See Miscellaneous Repair Operations

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S

495.0000 SALE

See also Credit Sales and Repossessions; Interstate and Foreign Commerce; Leases of Tangible Personal Property—In General; Mortagees and Trustees; Occasional Sales—Sale of a Business—Business Reorganization; Court Ordered Sales, Foreclosures and Repossessions; Service Enterprises Generally; Tangible and Intangible Property; and Vehicles. Consignment, see also Consignees and Lienors of Tangible Personal Property for Sale.

(a) IN GENERAL—DEFINITION

495.0010 **Taxable Events.** If property is purchased outside the state for use inside the state, the buyer is liable for use tax. If the property is later resold at retail after use in this state, sales tax applies to the sale. In this case, the sales tax and the use tax apply to different events, each of which is subject to tax. That is, the fact that the first event was taxable does not bar the application of the sales tax to the second retail transaction. 11/17/80.

495.0012 **Approval for Assumption of Loan—Condition of Sale.** A taxpayer entered into a purchase agreement to sell its business. The agreement was signed by the shareholders of the taxpayer on February 13, 1989. The agreement provided that: (1) the buyers would take possession immediately; (2) the seller's lease of the business premises would be assigned to the buyers; (3) the buyers would assume a loan on the business made by a financial institution in the amount of $62,758.75; and (4) the buyers were to provide business insurance effective February 14, 1989. No down payment was required.

The buyers did take possession of the business premises immediately and the lessor of the premises accepted the assignment of the lease to the buyers. However, the financial institution did not agree to the assumption of the loan by the buyer. The buyers made no payments on the loan and the financial institution foreclosed on the collateral for the loan that had been put up by some of the taxpayer's shareholders. The buyers filed for bankruptcy and did not list the fixtures and equipment of the business as assets in their bankruptcy proceedings.

The contract of sale was conditioned on the approval by the financial institution of the buyers' assumption of taxpayer's note. This did not occur. Since a condition precedent to the sale did not occur, there was no sale. The fact that the buyers did not claim an ownership interest in the fixtures and equipment in their bankruptcy is consistent with the conclusion that no sale occurred. However, the buyers did take possession of the property. Thus, since title did not pass to the buyers because of the failure of the condition precedent to the sale, taxpayer must be regarded as leasing such property to the buyers. Since the consideration to be paid, the assumption of liabilities, was never paid, there were no rentals paid. There is therefore no tax liability on the leases. (Regulation 1660(c)(1)). 4/24/91.

495.0020 **Barter.** A shoemaker who takes a pair of shoes worth $100 from his merchandise inventory and exchanges the shoes for an item for his personal use is engaging in a taxable sales transaction. A transfer of title or possession by

exchange or barter falls within the definition of a sale. Any transfer of tangible personal property in exchange for a thing of value is a sale. 12/29/64.

495.0032 **"Bill of Usage" Agreement.** Customers of a California company require the use of drilling equipment in their offshore operations outside California. The equipment is ordered by and delivered to the customers in California under a ''bill of usage'' agreement. At this time, no invoice or purchase order is issued, but the customers assume the risk of loss. The customers transport the equipment to an offshore drilling platform and use it as needed. As soon as any of the equipment is used on the platform, the customers issue a purchase order for equipment used and the billing procedure begins. Upon completion of an operation, the customers return any unused equipment to the company.

In determining when title passes for sales and use tax purposes, the provisions of the Commercial Code is used primarily. Section 2401 (2) provides that unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods despite any reservation of a security interest. The only other provisions of the Commercial Code that require consideration are those relating to ''sales on approval.'' However, the language of the sections on ''sales of approval'' is not consistent with this ''bill of usage'' agreement. Under the bill of usage agreement, the drilling equipment is not delivered for the purpose of ''trial,'' nor does the agreement contemplate that use or ''acceptance'' of any of the equipment constitutes acceptance of all of them. These transactions are not ''sales on approval'' within the meaning of the Commercial Code and that under section 2401 the sales occur when the equipment is delivered to the customers in California. Accordingly, sales tax applies to the sales. 4/23/69.

495.0033 **Billing For Magnetic Tapes Used As Storage Media In Time Sharing.** There is no sale or purchase of magnetic tapes used as storage or memory media in a company's time-sharing operation. This is true even though the customer manipulates the tapes by telephone access to the time-sharing company's computers and even though the cost of these tapes are billed to the customer. Title to these tapes is never transferred to the customer and there is no transfer or possession when the tapes remain at the location of the time-sharing company's computers and are manipulated by customers only through their remote access to the computers. The time-sharing company is the consumer of the magnetic tapes and its purchases of the tapes are subject to tax. 7/24/85.

495.0035 **Blank Master Tapes Used to Produce Movie Masters.** A taxpayer purchases blank master video tapes ex-tax and uses them to produce movie masters that are licensed to foreign distributors for a period of time. As the lease of a motion picture is not a sale, the taxpayer is the consumer of the tapes and other materials used. Tax applies to the purchase price of the tapes and other materials notwithstanding that the property is subsequently shipped outside the state. 3/22/92.

495.0040 **Blood.** The rule exempting sales of human blood or blood plasma for use in transfusions, also includes sales of products made from human blood

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without addition of other chemicals or products, except in minute amount for preservative purposes, provided the product in question is administered through injection into the blood stream. 1/28/55.

495.0045 **Blood Banks.** The transfer of blood by a blood bank for a consideration is a sale within the meaning of Section 6006(a). The sale, however, is exempt under Section 33. The blood bank is not a ''seller'' within the meaning of Section 6014 since the sale of blood is not a sale of property ''of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax.'' Accordingly, a blood bank is not required by Section 6066 to hold a seller's permit solely by reason of its sales of blood. Anticoagulants which are an integral part of the blood are in the same class as the blood itself for sales and use tax purposes. 9/29/71.

495.0060 **Booklet of Information.** A printer publishes informational booklets concerning California cities on behalf of a businessmen's association in each city described in the booklets. The association authorizes the printer to receive payment for the publication of the booklets directly from members who wish to place advertisements in the booklets, obviating the necessity of the association's soliciting its members for the placement of ads in the booklets, collecting payment from such members and paying the printer out of the proceeds. Under such circumstances the printer is regarded as selling the booklets to the businessmen's association and the amounts paid by the member-advertisers are regarded as taxable gross receipts from the sale of the booklets paid in behalf of the association. 2/28/68.

495.0074 **Cancellation Charges.** A taxpayer, upon receipt of a purchase order, purchases materials and components necessary for the manufacture of the product. Prior to delivery of any property pursuant to the purchase order, the customer cancels the order. If neither possession nor title to the purchased materials and components passes to the customer, tax does not apply to charges made for cancellation. 11/15/93.

495.0080 **Cash in Lieu of Prize.** The winner of a car in a raffle decided he did not want the car, but the cash instead, which the dealer gave to him out of the proceeds received from the organization conducting the raffle. The car remained on display at the dealership, was not registered in the winner's name and there was no transfer of title or possession to the car. Under these circumstances no sale took place, and thus, no tax liability would arise from the transaction. 12/8/66.

495.0110 **Children's Books Supported by Local Business.** A taxpayer proposes to provide personalized books to young school children without cost to the school or parents. The program would be supported by local businesses.

In this situation, the taxpayer would be regarded as selling the books to the local businesses. The sale is at retail and the taxpayer will therefore owe sales tax measured by the gross receipts from the sale of the books. Tax is due on the amounts paid to the taxpayer by the local businesses. 12/7/95.

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495.0120 **Church Organ Installation.** Musical instruments used exclusively for religious purposes are not exempt from the sales tax. The sale and installation of a new organ in a church, providing the organ is considered to be a fixture, makes the contractor, as the retailer, liable for the tax. The enlargement of an organ, which goes beyond merely repairing the organ, is regarded as a taxable sale measured by the gross receipts from that operation. 12/11/64.

495.0125 **Commodity Exchange—Aluminum Storage.** The function of a commodity warehouse for storage of aluminum is for the benefit of both the producer and the fabricator. The warehouse operator issues a ''warrant'' to the producer as evidence of title. These warrants are then sold and subsequently traded many times on the Commodity Exchange until a fabricator claims the unit of aluminum with his warrant.

Assuming the ''warrants'' are negotiable instruments of title as described in section 71004 of the Uniform Commercial Code and that the specific aluminum to which they relate is not identified until delivery to the fabricator, the transfers of the warrants are not subject to tax. For purposes of the Sales and Use Tax Law, a ''sale'' between the producer and fabricator would occur upon delivery of the aluminum to the fabricator. Unless the fabricator furnished the producer with a valid resale certificate, the producer would be liable for tax based on the gross receipts from the sale upon delivery of the aluminum. 3/5/84.

495.0130 **Conditional Sale v. Sale on Approval.** The sale of property which was delivered to the out-of-state buyer's agent in California who delivered it to an out-of-state university for testing, and then delivered it to the buyer in New York does not qualify for exemption as a ''sale on approval'' in interstate commerce merely because the ''approval'' occurred in New York. Pursuant to Regulation 1628(b)(3)(C), ''when a sale is on approval, the sale does not occur until the purchaser accepts the property.'' The Uniform Commercial Code, however, sets specific requirements for sale on approval. The recipient must have the unconditional right to return the goods, even if they meet the contract specifications. Any impediment to the exercise of this right prevents the contract from being ''on approval.'' Examples of such impediments would be requiring the buyer to make payment upon signing of the contract, retention of title by the seller until final payment is made, rather than upon approval, making the right to return the goods conditional upon failure to conform to the contract, and requiring the recipient to accept risk of loss. If these or other impediments prevent the contract from being ''on approval,'' the sale is a conditional sale as described in section 6006(e). 4/3/81; 7/10/96.

495.0160 **Consideration.** A charge made by a manufacturer to its dealers for property transferred in furtherance of a cooperative advertising program or other business promotion will not be regarded as a ''sale'' where the amounts paid by the dealers is less than 50 percent of the cost of the property. 4/27/65; 4/30/65.

495.0187 **Construction by Joint Venture.** Two California corporations form a joint venture for the fabrication and erection of structural steel. The joint venture will bid for and enter into a number of construction contracts over a significant

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period of time and will purchase all materials necessary to the performance of such contracts. The joint venture will hold its own contractor's license. Fabrication and erection activities will be performed by employees of the individual venturers. The joint venture will treat the labor as contributions to capital. Revenues from the joint venture will be distributed based on contributions to capital.

Tax does not apply to contributions to capital of a commencing corporation or commencing partnership in exchange solely for first issue stock in the commencing corporation or an interest in the commencing partnership. In this case, the ''contribution'' extends over a long period of time and could not be regarded as a contribution to a commencing entity. Thus when an employee of an individual venturer performs only fabrication for the joint venture, the venturer is making a taxable sale to a consumer (the joint venture). On the other hand, when a venturer contracts with the joint venture to both fabricate and install, the venturer is the consumer of any fabrication that it installs, and tax does not apply. 1/7/94.

495.0190 **Contest Prize—Automobile.** An auto manufacturer requests that a local dealer deliver an auto to the winner of a contest. The car is to be delivered from the dealer's inventory. The winner has no need for the auto and would like the dealer to keep it and give him cash instead. In as much as the winner will not receive either title or possession of the auto, there is no liability for sales or use tax. 3/26/93.

495.0195 **Contribution for Video Tapes.** A person distributes educational video tapes to the public and to professors, students or employees for $35.00 plus shipping and handling. The person describes the transfer of the tapes as a ''gift'' and the payment of the $35.00 as a ''contribution.''

For sales tax purposes, the transactions are regarded as sales of tangible personal property. Sales tax applies to the charge made for the tapes exclusive of actual shipping charges, but only to the extent of actual postage or shipping fees. The handling charges are taxable. 6/9/95.

495.0197 **Conversion of Raw Sulfur.** A taxpayer has sulfuric acid agreements with various oil refiners which provide for the conversion of the customer's raw sulfur or spent acid into fresh sulfuric acid at conversion prices covering only the processing charges. Shipments of fresh acid are made from the taxpayer's plants and by outside vendors (subcontractors) under purchase orders issued by the taxpayer ''for exchange of, or purchase of, sulfuric acid on a resale basis.'' Shipments from the taxpayer's plants have also exceeded the quantities of raw materials furnished by the oil refiners for conversion.

The application of tax is as follows:

Shipment from taxpayer. To the extent that the refiner has, contemporaneous with the shipment of fresh acid, a credit balance of sulfur with the taxpayer, tax applies only to the conversion or other charges made by the taxpayer to the oil refiner, and not to the value of the customer furnished sulfur.

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To the extent that the sulfur component of the fresh acid exceeds the sulfur credit balance maintained at the time of shipment of the fresh acid, tax applies to all conversion and other charges made by taxpayer and to the amount allowed for the sulfur subsequently furnished to taxpayer by the oil refiner in settlement of its ''deficit'' account.

Shipment from subcontractor. In cases where shipment of the fresh acid is made by a subcontractor (or by the contractor from a location other than the location where customer furnished spent acid is maintained), tax applies to both the conversion charges and the trade-in value of the spent catalyst furnished by the oil refiner. It is immaterial that the contractor may receive the spent acid prior to the time the fresh acid is shipped since there is no possibility that the oil refiner will receive, as a component of the fresh acid, materials furnished by the oil refiner to the contractor as a component of the spent acid. 4/8/71.

495.0199 **Delivery of Vehicle for Out-of-State Dealer.** An out-of-state new car dealer (not engaged in business in California) sold a vehicle to a company in California for delivery to a winner of a raffle held by the company. The out-of-state dealer ordered the vehicle from the factory which delivered it to California Dealer A for redelivery to the winner of the raffle. Dealer A was instructed by the company to collect the California sales tax and license fees from the winner.

However, the winner did not want to take delivery of the vehicle. Instead, the winner asked Dealer A to transport the vehicle to Dealer B located in another town. The winner then took delivery of a different vehicle and paid the cost difference to Dealer B. Dealer B collected ''sales tax'' and license fees on the replacement vehicle and offered the original raffle prize vehicle for sale.

This transaction falls within the provisions of the second paragraph of section 6007. Dealer A is considered the retailer of the vehicle it delivered and it owes sales tax on that sale. Dealer A may collect sales tax reimbursement if the contract so provides. The company who purchased the vehicle may be able to obtain payment from the winner for taxes it pays as a result of its contract and rules of the raffle. In any case, the Board will look to Dealer A for payment of the sales tax on the transaction.

Dealer A does not make a sales for resale to Dealer B. The winner's purchase of a more expensive vehicle is nothing more than a car purchased with a trade-in. Dealer B will be obligated to pay sales tax on the sale of the replacement vehicle. 9/23/96.

495.0200 **Destroyed Property.** When, prior to the passage of title, a vendor destroys a stock of forms upon instructions from the vendee that such stock is obsolete and customer is billed for such destroyed stock, there has been no sale and sales tax does not apply. 4/26/55.

495.0209 **Donated Property-Trust.** A revocable living trust donated fine art prints and books to a religious organization. The trust had received the prints and books from the grantor when the trust was created. The trustee has a seller's permit.

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The religious organization plans to give the donated books and prints to persons making donations to the religious organization.

No sales or use tax arises as a result of the transfer from the trustee to the religious organization because the trustee had received the property as a gift from a person who is not a seller and had not purchased the property for resale.

If the religious organization does not suggest a minimum donation in exchange for the property it gives to donors, the transfer is not a sale nor is there a taxable use since the property was not acquired in a transaction subject to sales or use tax. 2/3/94.

495.0214 **Donating Books.** A taxpayer is in the business of making and selling personalized computer books. As part of the operations, she gives personalized books to children in hospitals. Donations are received from private parties to help subsidize this operation.

Since the taxpayer has no contractual obligation to give the books and no consideration is received when the taxpayer does so, the books given to the children are not being sold. Rather, the taxpayer is the consumer of the materials incorporated into the books and tax is due on the purchase price of those materials by the taxpayer. 2/11/88.

495.0215 **Donation of Books to Schools.** A taxpayer proposes to conduct a reading program in which businesses contribute funds to provide personalized reading books (produced by taxpayer) to day-care centers and schools. The donors will receive recognition as a sponsor in a special page inserted into the books and will be thanked in an advertisement placed in a local newspaper. The taxpayer will not transfer the books directly to the businesses. Based on the facts, businesses are the donors of the books to the schools. This means that the taxpayer is making retail sales of the books to those donors and tax applies to the taxpayer's charges for the books. 10/24/96.

495.0216 **Donation as a Sale.** The transfer of a Bible is considered a sale when consideration is specified for which it will be transferred to a recipient, regardless of whether the consideration is denominated as a donation or otherwise. This includes a situation where a "donation" of a specific amount is requested or suggested, or where a "minimum donation" is suggested. The gross receipts would be the amount requested or suggested. Any amount submitted in excess would be a true donation and not part of the gross receipts.

The transfer of a Bible would not be considered a sale if there is merely a request for a donation, with no amount specified or suggested and no requirement that a donation be made as a condition of keeping the item.

However, if the amount specified or suggested as a donation is less than 50 percent of the cost of the Bible to the person distributing them, the transaction is not a sale and the distributor is the consumer rather than the seller of the Bibles. 4/12/78.

495.0220 **Embezzled Merchandise.** When a retailer's employee embezzles merchandise and the retailer has the option to recover the merchandise or accept

cash payment from the embezzler and the retailer elects to accept the cash, the transfer is a taxable sale. If it is impossible for the retailer to recover the merchandise, the payment by the embezzler constitutes damages for conversion and not taxable gross receipts. 9/14/67.

495.0230 **Eminent Domain Proceedings.** A transfer pursuant to a judgment in an eminent domain proceeding is not a taxable sale, whether or not the judgment is stipulated. However, a transfer for a consideration under an agreement reached in lieu of eminent domain proceedings in court would constitute a sale. 11/10/77.

495.0236 **Enrichment of Nuclear Fuel.** The following covers the application of tax to the processing of nuclear fuel used in a nuclear generating station. In the analysis, it is presumed that the fuel cycle is already in a continuous process.

First Step:

The ''reprocessing'' charges are taxable as ''fabrication'' or ''processing'' labor to the extent that plutonium and unused uranium are recovered for later use. However, the charges are exempt to the extent that neptunium, plutonium, and other by-products are sold. This will require an allocation of the reprocessing charge between taxable and nontaxable components.

Second Step:

The ''reconversion'' charge made for converting the unused uranium into uranium hexafloride (UF6) is taxable as ''fabrication'' labor.

Third Step:

The labor involved in the enrichment step is regarded as ''fabrication'' labor. The measure of tax is the labor charge made by the processor only and does not include the ''trade-in value'' of the uranium hexafloride furnished by the utility company (nuclear station owner) to the processor, provided (1) the utility company retains title to the uranium hexafloride and (2) the processor receives the uranium hexafloride for enrichment prior to the time it ships equivalent amounts of enriched uranium hexafloride for the utility company's account. If the two conditions are met, it is considered to involve a commingling of fungible goods and the utility company receives from the processor the ''same'' property furnished even though it may in fact not be the same physical property. If either of the two conditions are not met, the transaction is viewed as an exchange or trade-in transaction, and the measure of tax is correspondingly increased.

If the enrichment is done by the Atomic Energy Commission, tax will not apply as it will qualify as a purchase from the United States Government.

Fourth Step:

Tax applies to the ''manufacture'' step.

Tax applies on steps subsequent to the enrichment step even though the enrichment may have been performed by the Atomic Energy Commission. 3/1/73.

495.0240 **Erroneous Entries Transferring Equipment.** When entries in a company's books erroneously transferred the company's equipment to another entity, resulting in a sale by mistake, sales tax was due on the transfer despite the

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mistake because the transferee claimed depreciation of the equipment in the transferee's State and Federal income tax returns. The claim of depreciation constituted an exercise of ownership over the equipment. The transfer could not be considered a nullity and the sales tax could not be cancelled unless the transferee's State and Federal income tax returns were amended to exclude any claim of ownership over the equipment through depreciation deductions and to restore the equipment to where the equipment would have been before the erroneous transfer. 3/17/70.

495.0254 **Financing Arrangement.** A taxpayer is in the financing and leasing business. One of its customers owns several items of tangible personal property which it utilizes in its business. The customer proposes to issue a ''Bill of Sale'' to the taxpayer transferring all rights, title, and interest to the property to the taxpayer in exchange for a sum of money. Simultaneous with issuance of the ''Bill of Sale,'' the customer and taxpayer will enter into a ''Conditional Sales Agreement'' whereby the customer agrees to purchase the property from the taxpayer through installment payments with the taxpayer retaining a security interest in the property until all installment payments have been made.

If the customer retains benefit of property ownerships such as state or federal income tax credits and depreciation deductions, the interest rate charged by the taxpayer is nonusurious, and the taxpayer treats the transaction as a loan on its books and files appropriate UCC financing statements, the described transaction is a loan of money and is not a sale of tangible personal property subject to tax. 11/14/85.

495.0260 **Financing as Condition Precedent.** If purchase of a sales contract by a finance company is agreed to by the parties as a condition to the transaction and the finance company does not approve the buyer's credit, there is no sale for sales tax purposes. 10/2/58.

495.0280 **Fish Used as Bait.** The furnishing of bait pursuant to time charter agreements does not constitute a taxable sale of bait. 12/28/62.

495.0283 **Forfeited Property.** Forfeiture of property and the vesting of title to that property in a law enforcement agency which uses the property is nontaxable because there is no sale and no consideration paid for the transfer. 4/14/93.

495.0285 **Fueling Network Sales.** Taxpayer A enters into contracts with truckers to sell fuel to them. It issues network authorization cards. Taxpayer A also enters into agreements with Taxpayer B whereby B will dispense fuel to the truckers who hold authorization cards from A. The price arrangement between A and the truckers is unknown to B. A pays B the wholesale market price plus a markup for fuel which B delivers to holders of authorization cards from A. The truckers pay A for the fuel which they receive.

If A has a physical location in California, B is regarded as making a sale for resale to A and must precollect sales tax from A. A is regarded as the retailer and must report and pay sales tax on its sales of fuel. Both parties may claim credit for any prepayment of sales tax previously paid to its suppliers. If A does not have

a physical location in California, B is regarded as the retailer. B is liable for tax on the full amount charged to the truckers by A. 12/8/94; 5/29/96.

495.0288 **Funding of Purchase—Additional Fees.** A firm submits a bid to fund the purchase of equipment by a local government unit. It is the successful bidder and it purchases the equipment tax-paid and sells it to the local government under a contract calling for 60 monthly payments. The agreement provides that title will remain with the firm until the final payment has been made. This provision plus the last sentence of section 6006.3 requires that the transaction be treated as a sale at its inception.

The firm, in turn, issues certificates of participation for sale to investors. The local government unit's payment schedule results in a total that is greater than the price of the equipment, with the difference representing certain expenses related to the financial arrangements, e.g., bond fees, printing costs, etc.

The additional costs added to the agreed purchase price were incurred after the retail sale of the equipment, and are related to the sale of the participation certificates, which are intangible representations of value in the nature of stocks, bonds, etc.

The firm owes sales tax on the retail sales price of the equipment, but is entitled to a tax-paid purchase resold credit; no further tax is due on the financing costs. 8/22/94.

495.0290 **Government Service Transactions.** When property is furnished to members of the public by a governmental agency as required by law, there is not ''bargained for'' consideration and, therefore, there is no sale as defined by section 6006. Therefore, charges for printed material by the Judicial Council through the Department of General Services to the Superior Courts or by the individual Superior Courts to the private conservatorships are likewise nontaxable. Both transactions involving the Superior Court and the private conservatorships are regarded as government service transactions and not as sales, notwithstanding the fact that the transfer fees in the nature of cost reimbursement are paid in both instances. Sales tax applies to the sale made by the printer to the Judicial Council. 7/8/92.

495.0292 **Grower of Trees Has Option to Repurchase.** A tree grower has an agreement to grow, within one year, 100 trees for a consideration of $5000 from the purchasers. The trees are grown in containers. At the purchaser's option, the grower also agrees to repurchase, after nine months, any of the trees at a price of $75 per tree. The contract also specifies that the purchaser retains title to the trees during the contract period and may take possession of these trees by giving seven days notice and physically removing them from the nursery. The purchasers are not in the business of selling, growing or using trees. They do not have seller's permits and none have requested possession of the trees.

The growing contracts are contracts to sell goods and a sale takes place when the trees are identified to the contract. The contracts pass clear title to the trees to the purchaser for consideration. A sale has occurred under section 6006(a) and, unless the transaction is otherwise exempt under the law, it is subject to tax.

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In some instances, although consideration was received, the trees were not grown. If the property (trees) sold does not exist, then a sale of tangible personal property has not occurred and corresponding moneys received by the grower are not subject to tax. 5/29/84; 7/10/96.

495.0300 **Insurance.** An automobile dealer's delivery of a bill of sale to an insurance company upon receiving payment of a claim for an automobile stolen from his stock does not constitute a sale. 11/7/58.

495.0340 **Leaseback of Equipment in Place.** A manufacturer of wood products entered into a transaction in 1964 pursuant to which it transferred title to plant equipment in place and the transferee leased back the equipment. Although the purpose of the transaction was to obtain funds and the equipment was never moved, the transfer was not a loan, but a taxable retail sale. 2/23/68.

495.0360 **Location Listings—Land.** The sale of literature giving the location and method of obtaining State and Federal lands is a transfer of title or possession of the lists for a consideration, and not a service, and therefore is taxable. 4/29/60.

495.0370 **Minimum Donation.** Religious pamphlets and tapes supplied to the public for a suggested minimum donation are regarded as being sold for sales and use tax purposes. 10/16/72.

495.0375 **Narcotics Contraband.** A transfer of contraband narcotics for a consideration valued in money is a sale of tangible personal property within the definition provided by the Sales and Use Tax Law. The fact that the sales are in violation of penal code provisions and federal laws makes no difference as to the seller's liability under the Sales and Use Tax Law. 7/18/77.

495.0375.700 **Pollution Control Devices—Sale to California Governmental Agency.** A manufacturer's sale of water pollution control systems to California governmental agencies are not exempt from sales tax. Under section 6010.10 the exclusion does not apply unless the seller qualifies as a participating party pursuant to Health and Safety Code section 44506, and the agency to whom the system is transferred is the California Pollution Control Financing Authority. 10/3/95.

495.0376 **A Promise Is Consideration for Lease of Equipment.** The customer, pursuant to an agreement, promises to purchase a minimum of 50 test packs per day for 180 days at a stated price per test pack. In return, the customer is entitled, among other things, to possession and use of an automatic clerical analyzer and computer. Under such circumstances, a lease of the equipment is clearly in evidence since consideration in the form of the customer's promise to purchase a certain quantity of the test pack is given in return for possession and use of the equipment. A "loan for use" is not in evidence, since the lessor realizes "reward" in the form of the promise to purchase and actual purchases by the customer of the test packs. 11/1/85.

495.0376.500 **Property Dividend.** Corporation A purchases 100% of the stock of Corporation B. After the acquisition, B declares a property dividend of

unencumbered fixed assets. The transfer of the assets by a dividend without encumbrance is not a ‘‘sale’’ and tax does not apply. 3/22/88.

495.0377 **Property Transferred Pursuant to Court Order.** When a retailer removes property from its ex-tax inventory and transfers it pursuant to a court order which required the transfer as part of an award of damages, the retailer is the consumer of that property. Thus, the retailer must report use tax measured by the purchase price of the property. 3/26/90.

495.0380 **Punch Coded Tapes.** The sale by the manufacturer of a punch coded tape which contains coded information pertaining to bibliographical, Library of Congress numbers, and other information to be used for indexing new books is subject to tax. 12/15/67.

495.0385 **Purchasing Agent.** A taxpayer proposes to enter into an agreement to act as the purchasing agent for a hospital district (hospital). The contract provides that the taxpayer would purchase supplies on behalf of the hospital, warehouse all the supplies at its facilities until needed by the hospital, mark and identify those supplies as ‘‘for’’ the hospital, maintain insurance naming the hospital as an additional insured, pay the supply vendors, and be responsible for late charges, interest, and price changes arising from the taxpayer’s late payments.

The hospital is to pay the taxpayer the cost of supplies from the vendors and will be invoiced upon delivery to the hospital’s facilities. Payment will be due 26 days after the date of delivery to the hospital facilities. Also, the taxpayer guarantees no more than a maximum price will be billed to the hospital for the supplies. The taxpayer will be paid a set fee for performance of the requirements of the contract.

Based on the provisions of the contract, the taxpayer is not acting as hospital’s agent but, rather, is purchasing supplies for resale to hospital. In order for the taxpayer to act as an agent, the billing to the hospital must be the same as paid by the taxpayer to the supplier. Under the contract, not more than a stated maximum amount will be billed to the hospital. Thus, if the amount paid to the supplier exceeds the maximum, the taxpayer absorbs the difference. Additionally, the taxpayer is responsible for late charges, interest charges arising from late payments, and the hospital does not pay the taxpayer until 26 days after supplies are delivered to the hospital. Accordingly, it is in effect financing the hospital’s purchases. Also, the taxpayer is making purchases through a group purchasing arrangement. There is no evidence the taxpayer discloses to the vendor that the taxpayer purchases specific property as an agent of that hospital. Finally, the contract specifies that warehoused goods are marked held ‘‘for’’ the hospital. Under an agency arrangement, the goods would be the property of the hospital, not merely held for it. All of the above factors result in a conclusion that the contract is a contract to buy and sell and not an agency contract. 5/10/88.

495.0397 **Reimbursement of Government Fees.** The State Agency for Surplus Property, a part of Department of General Services, acquired two vehicles under the federal surplus property disposition plan and donated them to the Pleasant Valley School District in exchange for $700 and $450 handling and service

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charges. These payments do not represent gross receipts and do not cause a sale to have occurred because federal law requires that costs for packing, loading, etc., of donated surplus property shall be borne by the designated donee by reimbursement to the federal government. In addition, the state's plan of operation to comply with the federal law requires that the donee reimburse the state for the costs paid to the federal government. The amounts paid by the school district are fees for government services and not gross receipts from the sale of tangible personal property. 8/22/94.

495.0400 **Reimbursement of Hauling Expense.** The delivery of wood shavings by a mill to dairies, stables, and other customers for which a charge is made, constitutes a taxable sale, even though the charge is regarded as reimbursement of hauling expenses. 6/8/56.

495.0415 **Replacing Truck Parts—No Cost to Customer.** A truck repair shop made a mistake by not putting oil in the transmission before the truck left the shop. This destroyed the transmission. The shop bought a transmission for the customer and installed it in the truck at no charge to the customer.

The truck repair shop did not sell the transmission to its customer, but rather consumed it in repairing the damage the truck repair shop caused. Therefore, the sale of the transmission to the truck repair shop is subject to sales tax. If the truck repair shop used a transmission from its resale inventory, it must report and pay use tax on its purchase price with its return for the period in which the property was withdrawn from resale inventory for consumption. (Regulation 1668 (a)(2)). 7/11/96.

495.0420 **Repurchase.** Where, by agreement, a business is sold with an option to repurchase, and such option is subsequently exercised, each transaction constitutes a sale for sales tax purposes. 10/24/56.

495.0433 **Research Agreement—Right to Stock/Future Royalties.** A and B enter into a research agreement whereby B will pay to A a specified amount of development funds, which A will expend in an attempt to develop products for the treatment and diagnosis of AIDS, and to perform clinical testing and other activities required for U.S. Food and Drug Administration approval of any products which might result from AIDS research. The products, if any, would remain the property of A, and are not transferred to B. Instead as consideration for B providing the funds, if any products are developed, B will receive periodic royalties payable from the gross proceeds received by A from sales or license of the products by A. Also, A has issued to B warrants which allow B to purchase up to a stated maximum number of shares of stock A.

Since this agreement does not call for the sale, lease, or transfer of any tangible personal property, sales and use tax will not apply to the agreement. The transfer of funds in return for the right to receive future royalties and right to receive stock warrants does not constitute a transfer for consideration of tangible personal property. 7/29/88.

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495.0440 **Rescission.** A contract rescinding the purchase of business assets and calling for the return of the property to the original seller is not a sale. This is true even though the sale which is rescinded is a taxable retail sale for which the seller cannot claim a returned merchandise deduction because the full purchase price was not refunded. Rescission attempts to return the parties to the status quo and it may be necessary in a given case to allow the seller to retain a portion of the purchase price because of damages done to the business by the buyer. 9/8/65.

495.0442 **Rescission.** Company A sold equipment to B under a conditional sales contract. Later a dispute arose as to the balance due on the contract. To resolve the controversy, title was transferred to a leasing company which paid A a sum in settlement of the contract balance.

The transaction did not result in a rescission of the original sale and a sale by A to the leasing company. Rather it represented a refinancing of the transaction by B with the proceeds from the refinancing being paid to A in settlement of the disputed balance. 9/16/75.

495.0445 **Sales of Animals by Humane Societies.** Based on a 1941 opinion of Attorney General Earl Warren, the Board has consistently taken the position that sales of animals by Humane Societies are subject to sales tax. 2/2/96.

(This opinion was superseded by section 6010.40, operative January 1, 2000.) (Am. 2000–2).

495.0446 **Sale on Approval.** Commercial Code Section 2401 provides that if goods are delivered and may be returned by the buyer even though they conform to the contract, the transaction is a sale on approval and, unless otherwise agreed, title does not pass to the buyer until acceptance. If the seller reports the sale on approval as a taxable sale in the period in which delivery is made, and the buyer rejects the goods in a later period, a claim for refund filed timely should be approved with credit interest computed from the period in which payment was made. 10/10/75.

495.0449 **Sale of Bulk Wine on Bonded Premises.** A producer and wholesaler of wine owns and operates a bonded winery where it ages and stores bulk wine pursuant to a federal permit. In accordance with federal law, as long as the wine resides on bonded premises, no consumption of the wine is permitted, nor can any bulk wine be sold out of bond for the purposes of consumption. After bottling, the wine is then ready for resale and thereafter sold and removed from the bonded premises through the regular distribution channels.

At the beginning of the aging process shortly after the harvest, and while the wine is still in storage tanks, the producer/wholesaler transfers property interest in a quantity of bulk wines to outside buyers, generally individuals, but sometimes to groups of individuals. In some cases, the interest transferred is an undivided gallonage portion of the contents of a specific storage tank with the other portion of the gallonage remaining with the producer/wholesaler. Transfers are of 1000 gallons or more. In accordance with the agreement transferring the interest, the producer/wholesaler remains in possession and is employed as

custodian to properly manage the aging and processing of the bulk wine. After the transfer, the buyers are to reimburse the producer/wholesaler for the substantial cost incurred in aging and processing the wine in which they have an interest. Loss from shrinkage is borne by the producer/wholesaler during the first year of tank storage and by the transferees thereafter. The buyers of the bulk wine have the right to resell the wine at any time but this is subject to the producer/wholesaler's option to match the purchase price and thereby become the purchaser. In this situation, the producer/wholesaler is always the purchaser.

The above transfers constitute taxable retail sales. These conclusions are based on the following:

These transfers are not merely nontaxable transfers of something less than a transfer of title for sales tax purposes, i.e., in the nature of a transfer of a security interest. A substantial beneficial interest is transferred. While the transferees do not receive possession, they pay the going market price specifically to purchase the raw bulk wine gallonage. They have clear title, are assured that there are no liens of any kind, bear most of the risk of loss, and have authority to sell the bulk wine. The written contracts state that they are the beneficial owners of the wine upon making payment in full. The above contains the elements of a sale as set forth under section 6006(a).

The purchasers do not acquire the wine for the purpose of resale in the regular course of a business sales activity. The bulk wine is to be accounted for as an inventory item and the purchasers do not have the federal permits required for the alcoholic beverage sales activity. Moreover, while the purchases by the transferees helped the producer/wholesaler carry out the manufacturing process, the purchasers were analogous to an investment in such speculative items as coins, bullion, and works of art. (Regulation 1599(c)). 5/23/82.

495.0450 **Sale of Stores.** Simultaneous with the purchase of all the shares of stock of Company C, Company A entered into an agreement to sell ten of the individual stores of Company C to Company B. Company B is a subsidiary created for the purpose of establishing a group of franchised stores. The ten stores are individually transferred to a franchisee as rapidly as a franchisee can be obtained. Company B operates the stores until the franchisees takes over the operation. Company B contends that it purchases the property for resale and in fact resells the property to its franchisees. The stores are kept in operation prior to the sale to the franchise only so that the stores can be sold as operating businesses. Tax is paid on the sale of the furniture and store fixtures to the franchisees.

Since Company B operates the stores prior to reselling them, the sale to Company B is a retail sale. It is immaterial that Company B's operation of the stores is solely for the short interim period before resale and only for the purpose of being able to sell operating business. It is also immaterial that Company B pays tax on the subsequent sale of the stores. Tax applies to each retail sale of tangible personal property. 3/2/84.

495.0452 **Sale if Customer Agrees to Pay.** A retailer sends one volume of a four volume recording to potential customers on a "free will" offering basis.

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Accompanying the recording is a letter which states in part ''we are very much aware of today's marketing ways to get the dollar, so we are leaving the free will offering up to you. There is a cost to produce and mail these recordings to the few that are receptive, so if you can afford the cost printed on the back of the jackets we would appreciate the assistance in helping us produce more material to companion with in our moments of quiet. If you cannot afford to offer anything at this time, but feel the need of these recordings to companion with, don't hesitate to write and ask for them.''

The foregoing statement is regarded as an offer. When the customer accepts the offer by agreeing to pay the amount requested or by the act of sending money, an enforceable contract of sale is created. The transaction is contractual in nature because a valuable consideration (the price) is bargained for and received in exchange for the process to deliver the merchandise. In these cases, where the recipient agrees to pay a stated amount for the recordings, sales tax is due measured by that amount.

The fact that some persons receive the recordings without agreeing to pay the price does not warrant a finding that no sale occurs in instances where a customer agrees to pay a certain amount for the merchandise. In this situation, the recipients receive the merchandise pursuant to the alternative promise to make them a gift of the merchandise if they are unable to pay the price. Such transactions are legal and distinguishable because no valuable consideration is given in exchange for the promise that allows the recipients to retain the merchandise. Since there is no legal duty to perform, there is no contract and no sale to which the tax can be applied. 7/7/71.

495.0453 **School Cash Register Receipts Program.** Company A operates a program where schools collect cash register tapes from supermarkets and redeem them for merchandise. When a school has collected sufficient tapes to redeem the item it wants, it submits a redemption certificate to Company A. Company A then issues a purchase order to a non-California supplier who drop ships the item directly to the school. The supplier invoices Company A who in turn invoices the supermarket an amount greater than its cost. There is no fee to the school for participation in the program and the school does not advertise for the supermarket.

Under the scenario, neither the supermarkets nor anyone else receives any consideration from the schools. Thus, the transfer to the school is not a sale. Rather, the supermarkets are regarded as the consumer of the property at the time the title is transferred to the donee (schools). Title to the property is transferred to the donee (school) outside California. Therefore, neither the use tax nor the sales tax applies since the purchaser (supermarket) does not use the property in California (gift takes place outside California).

On the other hand, if the item is shipped from an in-state location of the supplier directly to the school in California, the transaction is regarded as a taxable sale in California. If Company A is a retailer engaged in business in California, sales tax would apply to the sale. If Company A is not a retailer

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engaged in business in California, the supplier would be regarded as the retailer pursuant in section 6007 of the Revenue and Taxation Code and would owe sales tax on the sale. 10/9/92.

495.0455 **Scrap Materials Sold to Teachers and Children's Groups.** A taxpayer collects donations of local industrial discards, most of which have little retail value. The taxpayer makes the materials available to teachers and children's groups for use as art supplies or learning materials. The taxpayer charges a general shipping and handling fee to help cover the costs of transportation from the donor to the taxpayer's warehouse and for handling within the warehouse. The charge is based on the volume of materials. For example, a grocery bagful of discarded materials may bear a charge of $5.

The transfers are retail sales subject to tax. The shipping and handling fee is also subject to tax because it is a cost of doing business and is a part of the sales price. 10/14/94.

495.0460 **Seller Becoming a Limited Partner in Purchaser's Operation.** Where the seller of a business as security for the payment of the purchase price enters into an agreement with the purchaser whereby the seller becomes a limited partner in the new operation, the transaction may be a taxable sale under either subsection (a) or subsection (e) of Section 6006.

There has been a transfer of title or possession of tangible personal property for a consideration, and the seller retains title to some portion of the assets as security for payment of the purchase price. 10/15/53.

495.0465 **Special Order Contracts.** A contract is written for a special order and the customer places a non-refundable 20% down payment. The amount of the sales tax reimbursement is set forth on the special order form. The ''Warranties and General Information'' section of the form contains the statement: '' Special Orders. Please give careful consideration when making your selection. There will be no cancellation accepted on Special Orders, because this merchandise is ordered according to your exact instructions, and may not be right for other customers''.

The special order contract sets forth the amount of tax. The buyer's right to cancel is subject to the duty to forfeit the deposit; this is not an unconditional right to terminate. Finally, the parties have not reserved the right to alter the tax obligation in the event of a change in tax rates. The special agreement constitutes a contract for fixed price. Special orders executed prior to July 15, 1991, are exempt from the tax increase. 7/30/91.

495.0465.750 **Telecommunication Devices for the Deaf.** The charges by a public utility for telecommunication devices for the deaf (''TDD'') to the Deaf Equipment Acquisition Fund Trust (''Trust'') are not subject to sales tax. The Public Utilities Code section 2881 provides that the commission shall establish a rate recovery mechanism to allow the telephone corporation to recover costs as they are incurred under this section. There is no implication that telephone corporations are to sell the equipment to any other person. What is contemplated

is that telephone corporations should recoup the costs of furnishing the equipment, on a tariff basis acceptable to the Commission, and that the Trust is to reimburse the telephone company for the sales tax cost to the telephone company in acquiring the TDD equipment. The telephone company is the consumer of the TDD equipment and retains title, although capital charges are charged to the Trust. 4/5/88.

495.0466 **Toys Furnished to Children when Touring Manufacturing Plant.** A maker of stuffed animals allows school children to tour the plant and watch the manufacturing process. Older children are given a stuffed bear and very small children are given a small mouse. The tour price is $8.00 for the older children and $2.00 for the little ones. None of the stuffed animals are otherwise available on a retail sale basis at the plant. The furnishing of the bears and mice to the children are taxable retail sales. 7/1/91.

495.0468 **Transfer of an Aircraft without Consideration.** An aircraft was transferred by an individual to a corporation which will not pay any consideration to the individual or any other person in exchange for the contribution of the aircraft to its capital. It will not issue stock or other securities or assume any indebtedness or other liability in connection with the transfer. The transfer is not a sale or purchase under sections 6006(a) and 6010(a) respectively since no consideration was involved in the transfer. The completion of the Bill of Sale for FAA purposes, which recites formalities of consideration, will not change this conclusion provided there actually is no consideration paid by the corporation or received by the individual in exchange for the transfer of the aircraft. Since the transfer is not a sale or purchase, there is no sales or use tax with respect to the transfer. The corporation's subsequent lease of the aircraft, which is a lease of mobile transportation equipment, is also not subject to use tax. 3/3/89.

495.0469 **Transfer of Artwork by Artist Via Computer.** An artist prepares artwork and places it on the artist's removable computer storage media (e.g., floppy disk). The artist takes the disk to the customer's location, inserts the disk into the customer's computer, and transfers the artwork from the artist's disk to the customer's computer. The artist removes the disk and retains it, and does not otherwise provide any tangible personal property to the customer. The transfer is not a sale of tangible personal property provided the artist retains title to and possession of the disk at all times. For example, if, after inserting the disk and prior to its removal, the artist leaves the computer and the customer uses it, the artist would be regarded as making a taxable lease of the disk. 7/22/96.

495.0469.175 **Transfer of Artwork—External Storage Diskettes.** When an artist creates artwork on a client's computer and saves the artwork into the computer's memory, the artist's charge is nontaxable. In this situation, the artist does not transfer tangible personal property to the client. The same result is not reached when the artist transfers the artwork to external storage diskettes or disks and transfers them to the client, whether the client or the artist furnishes the removable disk or diskettes. When the artist furnishes the disk or diskettes, the artist is making a sale of tangible personal property under subdivision (a) of

section 6006. If the client furnishes either new or used disks or diskettes, the artist's charge for the work performed to create the artwork is a sale as defined in subdivision (b) of section 6006. The artist's charge for the sale, whether under subdivision (a) or (b) of section 6006, is subject to tax. 12/2/96.

495.0470 **Transfer of Artwork By Modem.** When artwork is transferred by modem, tax does not apply regardless of the reason for using this method of transmission. The artist must retain some form of evidence to support the claim of transmittal by modem. It is immaterial that under federal law the buyer may be regarded as the owner of the artwork prior to transmission. 5/31/94.

495.0475 **Transfer of Beneficial Interest in Trust.** The transfer solely of a beneficial interest in an irrevocable trust of the type described in California Probate Code 82 subsection (a) is not a transfer subject to California sales or use tax. 12/7/89; 12/11/89.

495.0476 **Transfer of Boat Due to Bankruptcy Abandonment/Divorce.** A boat is registered in the names of four partners, two married couples. Couple A declares bankruptcy. The court relieves them of their share of the debt remaining on the boat, and they abandon their interest in the boat. Couple B becomes the owner of the boat and the parties responsible for the entire remaining debt. Inasmuch as Couple A's relief from debt occurred by operation of law, there was no consideration for the transfer of the boat to Couple B and, therefore, no purchase occurred. Subsequently, Couple B divorced with the court awarding the equity and liability relating to the boat to the husband. Here again, the transfer is by operation of law rather than by passage of consideration in any form and no purchase resulted. 8/28/91.

495.0478 **Transfers of Computer Programs.** Taxpayer A purchases the assets of Taxpayer B. Taxpayer B owns software and technology which is incorporated into its computer programs. The transfer of the software is made by connecting the computer of Taxpayer A to the computer of Taxpayer B at B's place of business in California and transmitting the programs through the connection. Each party retains control of its own computer during this process. After verifying that the programs are successfully transferred, the programs are purged from the seller's computer and the computer which is leased by B is sold to A by the lessor. There is no sale of tangible personal property in the transaction involving the transfer of software from B to A by electronic means. Therefore, no tax is due on that transaction. 6/15/94.

495.0480 **Transfer to Correct Error.** Where a truck was purchased for use by the "X" corporation and was exclusively used by it, but through error, the purchase agreement and all payments thereunder were made by "Y" corporation, the subsequent transfer to the "X" corporation by "Y" corporation to correct such error, is not subject to sales tax. 6/3/55.

495.0483 **Transfer Fixtures and Equipment to a Trust.** An individual transfers the book value of certain assets to a trust. The trust term is for ten years at the end of which the assets will revert to the individual as trustor.

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A trustee is a ''person'' under section 6005 and the transfer of legal title to the trustee of the trust property is a transfer of title within section 6006. However, that section also requires that the transfer be ''for a consideration.'' The consideration must be measurable to be sufficient to meet the requirements of section 6006. The creation of a trust requires no consideration.

Since the only assets are transferred to the trustee with no measurable consideration, such as cash, notes, or assumption of liabilities flowing to the trustee, no sale occurs. 12/1/71.

(Note section 6285 re transfers of vehicles, vessels, and aircraft to revocable trusts)

495.0485 **Transfer of a Lease of Mobile Transportation Equipment Held in a Trust.** Company B is a lessor of mobile transportation equipment (MTE) leasing to Company D and reporting use tax measured by fair rental value. The lease is held in a trust, with Company B as trustee and Company C as the beneficiary of the trust. Company A acquires the lease from Company B and, in accordance with trust documents, Company A is substituted as the new trustee and lessor. Also, the beneficial ownership in the trust is transferred from Company C to Company E.

Based on the above, the MTE remains the property of the trust after a new trustee and beneficiary are substituted for the old and, therefore, there is no sale of the MTE. Since the election to pay tax on fair rental value is irrevocable if there is no sale, the trust must continue to pay tax on the fair rental value.

Even if there is a sale of the MTE to a new lessor, the new lessor may also elect to pay use tax on the fair rental value by issuing a resale certificate and paying tax on fair rental value. The election must be made on a timely filed return for the period in which the sale occurred if the property is subject to a lease at the time the sale occurred. 5/5/93.

495.0490 **Transfer to Revocable Grantor Trust.** An individual intends to transfer the ownership of an aircraft to a revocable grantor trust of which that individual is both the grantor and trustee.

If a donation of the aircraft to the trust is for no consideration, the transaction would not be subject to use tax. However, if the trust provides a consideration in exchange for the aircraft (e.g. assumption of liability for an outstanding loan) the use tax would apply measured by the consideration paid by the trust. 3/25/92.

495.0493 **Transfer of Title or Possession.** A construction equipment dealer is involved in sales and leasing of new and used equipment. In January 1988, the dealer entered into a lease agreement with a construction firm (customer) for a lease of a wheel loader. Although the customer never took possession during the term of the lease, it paid a total of $176,000, at the rate of $11,000 per month. The agreement provided a purchase option; but it was never exercised. The wheel loader was resold by the dealer to another purchaser and the $176,000 was later applied towards the purchase/lease of a second price of equipment.

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The dealer and customer entered into another lease agreement for another wheel loader on February 21, 1990. On July 11, 1990, the customer exercised the purchase option; and the dealer applied the $55,000 paid in lease receipts and the $176,000 paid in transaction #1 above against the purchase price. It was intended that the equipment be delivered to Oregon; however, delivery was never made during the term of the lease or when option was exercised. The equipment remained at the dealer's place of business and is currently available for sale.

The dealer and the customer also entered into another transaction involving a lease of a scraper which was entered into on June 1, 1990. The agreement provided for monthly payments of $14,000 and contained a purchase option. On January 21,1991, the option was exercised, and the dealer applied the $112,000 paid in lease receipts, towards the purchase price. As above, it was intended that the scraper would be delivered to Oregon; however, delivery was never made during the term of the lease or when the option was exercised. The equipment remained at dealer's place of business until April 7,1994, at which time it was sold to another purchaser. The dealer issued a check made payable to the customer in the amount of $250,893 involving three transactions with the customer.

The chief characteristic of renting or leasing is giving up possession to the hirer, so that the hirer and not the owner uses and controls the rental property (*Entremont* v. *Whitsell* (1939) 13 Cal.2d 290, 295; California Civil Code sections 1925 and 1955). This is consistent with Revenue Code section 6006.1. Although Regulation 1628(b)(3)(B) does provide that a sale by lease does not occur even where there is a right to possession, this portion of the regulation is limited in its purpose. This rule only applies in a situation where there has in fact been a delivery. Therefore, there has been a lease of the equipment and no tax is due on the lease receipts. Likewise, the second and third transactions did not amount to sales. Revenue and Taxation Code section 6006(a) defines a ''sale'' to mean and include any transfer of title or possession of property for a consideration. Here, possession was never transferred to the customer. Uniform Commercial Code section 2401 provides that title passes to buyer ''in any manner and on any condition explicitly agreed upon by the parties.'' However, where there is no passage of title provision in the contract, such as here, once goods are identified, the passage of title depends on the type of performance required of the seller; i.e., whether shipment or delivery of the goods is required, or delivery is to be made without moving the goods. Where the goods must be moved, title passes to the buyer at time and place at which seller completes physical delivery of the goods.

Accordingly, since there was no transfer of title or possession, there was no sale. 8/25/94.

495.0497 **Transfer of Vehicles to Stockholder.** ''A'' a wholly owned subsidiary of ''B,'' transferred certain vehicles to B as a dividend. B then transferred one vehicle to D and the remaining vehicles to C, both wholly owned subsidiaries of B, as a contribution to capital. No consideration was paid to, or received by, any of the corporations as a result of the transfers.

Based on the assumption that no indebtedness was assumed on behalf of A for its transfer as a dividend to B, and that A will receive no other consideration for

the transfer, the transfer from A to B is not a sale and is not subject to sales or use tax. Also based on the assumption that no indebtedness was assumed by anyone on the transfers from B to C and D, and since a sale and purchase is a transfer of tangible personal property for a consideration and these transfers were not for a consideration, there was no sale or purchase. Since there was no sale or purchase, there will be no sales or use tax on the transfers from B to C and D. 3/7/88.

(b) CONDITIONAL DELIVERY

495.0520 **"Sale or Return."** Sale of personal property on a ''sale or return'' basis, wherein title passes upon delivery to the buyer subject to a condition subsequent whereby the buyer may revest title to the unused portion of the property by returning the same to the seller, constitutes a taxable sale.

If upon the return of such unused property, the seller fails to refund or credit the full sales price, including all freight charges for delivery of the goods, if title passes upon delivery, no deduction may be taken for ''returned merchandise.'' 1/9/54.

(c) TIME AND PLACE OF SALE

Conditional sale contracts, see Credit Sales and Repossessions. Escrow transactions, see Occasional Sales—Sale of a Business—Business Reorganization. "Lay-away" sales, see also Credit Sales and Repossessions.

495.0540 **"Bill on Usage Agreement."** A sale under a ''bill on usage'' agreement, pursuant to which drilling bits are delivered in California to an oil company for use in off-shore drilling outside of California, is a California sale subject to tax, even though the bits are not billed to the oil company unless and until they are used. 4/18/69.

495.0560 **Cancellation of Order.** Where equipment is ordered from out-of-state by a California purchaser f.o.b. shipping point and the purchaser then cancels purchase orders, but equipment is nevertheless shipped and subsequently accepted by purchaser, sales tax applies as title passed upon acceptance of shipment in California. 4/30/54.

495.0580 **Documents Transferring Title.** Sales tax does not apply to transfer of automotive equipment physically located outside this state at the time of transfer and licensed in other states, notwithstanding that the documents transferring title may be delivered to the transferees within the boundaries of this state. 3/18/55.

495.0610 **Photo Plots and Drill Tapes.** A corporation designs, manufactures, and sells ''Burn-In Boards'' (BIBs) which are used to test the components of electronic equipment. The BIBs are designed in accordance with the customer's specifications. When the design is complete, a ''photo plot'' of the design is made on paper or mylar. Upon the customer's approval, the corporation's computer reads the photo plot and fabricates a drill tape for use as a template in manufacturing the BIBs. The corporation does not transfer possession of either the photo plots or the drill tape to its customers. The corporation's invoices included separately stated charges labeled ''artwork blue-lines'' which are

SALE (Contd.)

intended as charges for the design and fabrication of the photo plot and drill tape. Tax reimbursement was charged and reported on the charges for BIBs and artwork blue-lines on sales to California customers. However, when the BIBs were sold to and delivered to customers outside California, tax reimbursement was not charged nor reported on any part of the sale.

The documents of sale indicate that the corporation was selling the photo plots and drill tapes to customers because, pursuant to the contracts of sale, title to these items passed to the customers prior to being used in manufacturing the BIBs in California. As such, tax is due on the sales of photo plots and drill tapes to both the California customers and also to those customers outside California. However, the selling price of the BIBs shipped in interstate commerce pursuant to the contract of sale are not subject to tax. 11/7/91.

495.0620 **Place of Sale.** An out-of-state dealer, who is not engaged in business in California, takes an order for an automobile and the order is shipped from a third party warehouse in Irvine, California, to a retail customer in Los Angeles, California.

Since the property is located in Irvine at the time the sale takes place, the sale takes place in Irvine and sales tax applies to the sale. Pursuant to section 6007, the person who delivers property directly to a California consumer pursuant to a retail sale made by a retailer not engaged in business in California is deemed to be the retailer and must report tax on the retail sales price.

When the vehicle is registered and licensed to the customer in Los Angeles County, the sale is exempt from district transactions taxes imposed in Orange County and is subject to district use tax in Los Angeles County. Thus, the 1% Los Angeles district use tax applies, and the retailer is required to collect the tax. 9/27/94

495.0625 **Place of Sale—Sales v Use Tax.** In determining the place of sale, you must first determine if there is a title clause. Unless such a title clause passes title sooner, title passes and the sale occurs when the seller completes its duties with respect to physical delivery of the property (Cal UCC 2401.) When delivery is by the seller's own facilities, the seller completes its duties with respect to physical delivery upon tender of the property to the purchaser. When delivery is by common carrier and the contract states "F.O.B. destination," the seller does not complete its duties with respect to physical delivery until the property is delivered at destination. Under such a contract, the sale occurs at destination unless the contract specifically states that title passes sooner. If the contract does not have an F.O.B. destination provision and delivery is by common carrier, the sale occurs upon the seller's tender of the property to the common carrier, unless the contract specifically passes title sooner.

If the sale takes place out of state, the only tax that can apply is use tax and the participation of an in-state sales office is irrelevant. On goods shipped to California by common carrier F.O.B. Destination (with no specific title passage clause), the sale takes place in California. Thus, the question of the participation by an in-state sales office needs to be resolved to determine if sales or use tax applies. 9/18/95.

SALE (Contd.)

495.0640 **Replacement of "Borrowed" Material.** Where, in order to complete a prompt out-of-state delivery of material, vendee ''borrowed'' a portion of the material from a California firm and directed vendor to subsequently deliver a like portion of materials to the California firm in California to replace such ''borrowed'' materials, a taxable retail sale results with respect to such delivered replacement. 2/24/56.

495.0660 **Replacement of Property for Foreign Insurer.** The replacement of a plate glass window in California on behalf of a foreign insurance company is a sale subject to sales tax. The delivery and installation of the glass having been made in California, sale is completed here, and the fact that the insurance company is located in another state is immaterial. 3/7/55.

495.0668 **Time of Passage of Title.** When a contract of sale is silent regarding the time of passage of title, general law provisions are governing. California Commercial Code section 2401(2) provides that title passes at the time that seller completes performance regarding physical delivery of the property. The buyer's right to acceptance may act as a condition precedent to its obligation to pay the price, but it does not preclude passage of title when the delivery conditions have been met. If the buyer does reject the goods after delivery, title revests in the seller. 4/9/92.

495.0670 **Time of Sale.** Taxpayer sells horses under a contract which provides that the seller retains title to the property until full payment is received. However, upon execution of a promissory note for any unpaid balance, the buyer has the right and power to direct the delivery or any other use of the horse.

The ''sale'' takes place at the time the promissory note is executed. It is at this time that the buyer acquires the right and power to direct the transfer of the horse. If the horse is left with the taxpayer for training and conditioning, the sale is subject to tax.

If at the time of the signing of the note the buyer instructed the taxpayer to ship the horse out of state and the taxpayer did so, the sale is exempt under section 6396. 3/29/90.

495.0671 **Time of Sale—Depreciation.** A sale takes place when there is a transfer of title or possession for consideration. It occurs no later than when the seller completes its responsibilities with respect to physical delivery. Depreciation by the purchaser is not determinative as to when a sale of tangible personal property takes place. The Board has generally looked at a taxpayer's depreciation of assets to show that those assets are not held for resale or as evidence of an exercise of ownership. However, depreciation alone is not always sufficient to show when a sale necessarily took place. 3/16/98. (M99–2).

495.0672 **Time of Sales Tax Liability.** Payment of sales tax is on an accrual basis and not on a cash basis. Sales tax must be reported and paid with the return for the period in which the sale occurs. The timing of the payment for the sales

SALE (Contd.)

is not relevant to the timing of a taxpayer's liability for sales tax, nor is the timing of the taxpayer's invoice (except when the timing of the invoice or payment affects the timing of title passage).

For example, if the taxpayer invoices and receives payment for property during one period and makes the actual sale during the next reporting period, the taxpayer must report and pay the tax with the return for the second reporting period, when the sale occurred, not the first reporting period during which the taxpayer invoiced and received payment. Similarly, if the taxpayer makes a sale in one reporting period and invoices and receives payment in the next reporting period, the taxpayer must report and pay the tax with the return for the first reporting period, when the sale occurred, not the second reporting period when the taxpayer invoiced and received payment. If the taxpayer receives progress payments for its sale over four reporting periods and transfers possession of the subject property to the purchaser in the third reporting period, the taxpayer would owe all the sales tax due with the return for a single period. The reporting period would be the one in which the sale occurred. Since the taxpayer would have transferred possession during the third reporting period, the sale would occur no later than that reporting period. (Cal. U.C.C. § 2401.) However, if title passed prior to that reporting period, the taxpayer would owe tax prior to the third reporting period. If, for example, the contract of sale provided that title would pass to the purchaser as soon as 30 percent of the purchase price was paid, the tax would be due with the return for the period in which 30 percent of the purchase price was paid. 10/21/96.

495.0675 **Title Passage Evidence.** Where a contract is performed without a written contract but based on a written estimate, a statement on the estimate that title passes at the time and place of shipment is acceptable when the customer accepts the estimate. 11/3/93.

495.0677 **Title Transferred Prior to Delivery.** A retailer has a contract for the development of computer hardware and software. Physical delivery of the computer hardware and software occurred in February 1991 but the customer was invoiced, title transferred, and payment was received all during the third quarter of 1990. The customer had until March of 1992 to make final acceptance.

Pursuant to section 6006, ''sale'' means and includes any transfer of title or possession, conditional or otherwise, of tangible personal property for a consideration. In the above situation, although physical delivery did not occur until February of 1991, title transferred and payment was received during the third quarter of 1990. Since the physical delivery of the computer hardware and software is not required for a sale to occur, tax was due on the return for the third quarter of 1990. 11/5/93.

495.0680 **Uniform Commercial Code, Effect of.** The reason for Section 6010.5, added by Assembly Bill No. 1, effective September 17, 1965, is to forestall any possible contention that under the provisions of the new Uniform Commercial Code, the place of sale might be deemed to be other than the place where the property is physically located at the time of sale. There are some

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provisions in that code which might be interpreted as providing for a different place of sale. It is not expected that this change will cause any different application of the tax, but will rather preserve the existing application of the tax notwithstanding the changes that were made in the Uniform Commercial Code. 9/10/65.

495.0700 **Uniform Commercial Code, Effect of.** After January 1, 1965, the effective date of the Uniform Commercial Code, title to tangible personal property passes to the buyer upon physical delivery by the seller, even if payment is made by a check that is subsequently dishonored, unless there is an explicit agreement to the contrary. Transactions occurring prior to January 1, 1965, are governed by prior law. 9/25/67.

(d) TRANSFERS BETWEEN RELATED LEGAL ENTITIES

495.0707 **Agency by Ratification.** A firm purchased equipment over a period of time in its own name and entered into contracts to lease the equipment from a third party. The firm maintains that it purchased the equipment as the agent of the lessor and thus, there was no use of the equipment by it followed by a sale and leaseback from the lessor. Rather, it maintains that the initial acquisition of the equipment was a purchase by the lessor with the firm acting as the agent.

Prior to entering into the first lease contract, the firm had no known relationship with the lessor. Since there was no known relationship, the firm could not have acted as an agent on any purchases prior to the first lease. It purchased property in its own name and without an existing relationship there could not have been a ratification by the lessor that the firm was acting as an agent.

With respect to purchases after the first lease contract, it was clear that the firm intended to act as the lessor's agent. Evidence of an agency was established by the fact that (1) the firm recorded the purchases in a special suspense account rather than its regular balance sheet, (2) it did not depreciate the equipment or claim any other benefits of ownership, and (3) it paid rent to the lessor from the date of installation of the equipment even if such installation preceded execution of the lease agreement for that particular piece of equipment. Thus, the subsequent ratification of the agency by the lessor is recognized. 5/25/93.

495.0709 **Agent Defined.** The courts have held that an agent is a person who has the power to alter the legal relationships between the principal and third persons, who is entrusted as a fiduciary to act for the benefit of the principal, and who is subject to the principal's right to control. 3/11/93.

495.0713 **Assumption of Liabilities—Joint liability.** Assets were transferred to a wholly owned subsidiary in exchange for first issue stock and the assumption of liabilities. The transferor corporation remained jointly liable for the liabilities. The assumption of liabilities by the transferee corporation is consideration notwithstanding the transferor's joint liabilities. The transferee conferred a benefit on the transferor and, thus, provided the consideration requirements for a sale. 1/21/93.

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495.0720 **Closely Connected Corporations.** The transfer of printed letterheads, interoffice memorandum forms and Xerox copies to an automobile association, from the insurance carrier of the association, is a taxable sale, even though the two corporations are extremely closely connected, with the carrier reimbursing the association for 65 percent of its expenses. Since the carrier and the association are two separate corporate entities, making the transfer of the property to the association was a taxable retail sale under Section 6006. 2/24/67.

495.0722 **Co-Owned Gas Plants and Producing Properties.** Contributions of property to the joint operation (JO) for a capital interest are not subject to tax. However, sales of property by a participant to the JO for conventional consideration are subject to tax except for the fractional interest of the selling participant. The distribution of assets at the dissolution of the JO are generally not subject to tax, but the withdrawal of assets by a member of the JO before 80 percent completion of the operation are sales and subject to tax except for the fractional interest which had been retained by the member.

New materials provided by the operating member from its own inventory are considered to be taxable sales to the JO, except for the fractional interest of the operator. If the materials were held in a tax paid status, the operator may take a tax-paid purchase resold deduction (except for the fractional interest retained). Transfers of used items from the operators inventory are subject to the same treatment as new materials, EXCEPT a tax-paid purchase resold credit is not allowable. The sale of JO property to nonmembers is a sale of each member's interest and each is liable for the tax if the sale is taxable and if the operator fails to report the tax. If materials are transferred from the JO to the operator or other member of the JO, tax is due on the proportion of the change in ownership. Transfers by members to the JO are sales by the transferor to the extent of the change in ownership and sales tax reimbursement may be charged to the JO. Petroleum products transferred to the JO by the operator or any member of the JO are subject to the same taxability as the operating materials discussed above. 8/23/84; 5/29/96.

495.0725 **Dividends in Kind.** Transfer of property from a corporation to a sole shareholder which is shown on the books of both entities as a dividend is not a sale unless the corporation declaring the dividend receives consideration for the property transferred. 7/22/76.

495.0730 **Revocable Trust.** A truck, a boat, and an airplane are transferred by the sole owner into a revocable living trust. The owner of the assets is sole trustor, trustee and beneficiary and remains solely liable for all encumbrances attached to the assets. In this case, the transfer is not a sale, subject to sales tax, as there is no consideration given for the assets. 7/31/89.

495.0733 **Sale.** The transfer of a vehicle with a balance owing into a trust is not a sale if the transferor continues to make the payments from current income which is not part of the trust's assets and the trust has not agreed to assume the liability. In these circumstances, the transfer has been made for no consideration and no use tax is due on the transfer of the vehicle.

SALE (Contd.)

If a vehicle which is owned free and clear is transferred into a trust simultaneously with property such as a house and jewelry which the trust has not agreed to assume, there is a balance owing on the house and jewelry, and the transferor continues to make the payments from income which is not part of the trust's assets, a sale does not result as no consideration is involved. However, if the trust were to start making the payments on the house and/or jewelry, a sale would occur and a portion of the consideration would have to be allocated to the transfer of the vehicle. Tax would apply to this prorated amount. 11/21/90.

(Note subsequent statutory change re transfers to revocable trusts. See section 6285(b).)

495.0735 **Sale of Equipment—Oil Well Operating Agreement.** Under the provisions of an oil well operating agreement, each member holds a pro-rata share of title to the equipment acquired. The co-owners operating agreement does not create a ''person'' within the meaning of Section 6005. Since each member is a co-owner, a transfer of property (to the jobsite) by one member which becomes co-owned by the other members gives rise to a ''sale''. Tax applies to the percentage of the sale price which relates to the property interest of the other co-owners. For example, if the transferor holds a 25% interest in the ''operating agreement equipment'' 75% of the transfer price is subject to tax.

The fact that the transferor is the operator of the site and holds a security interest in the property transferred does not affect this conclusion. 12/6/90.

495.0736 **Stock Exchanged for Corporation Assets.** Corporation X had several branch offices selling and servicing automobiles. Pursuant to the policy of the manufacturer of the automobiles to decentralize its dealers, it was decided to create separate entities at each branch, otherwise all branches would lose their franchise. Accordingly, a contract was entered into whereby two of the three shareholders each turned his one-third interest as shareholder over to the corporation in exchange for one-third of the assets of the corporation.

The transfer of the property to the former shareholders for their shares is a taxable transaction. In this case corporation X was not dissolved since there was no distribution of the entire assets to its shareholders. Only two of the three shareholders exchanged their stock for assets of the corporation. 1/25/52.

495.0736.720 **Transfer of Assets to Creditors/Shareholder.** Individuals A and B formed X Corporation in 1947, each contributing $500 to the corporation and each receiving a $500 share holding interest. The corporation was created to engage in the business of buying and selling objects of art. Individual A, during the four years of operation, loaned $224,681 to X Corporation. In the fourth quarter of 1951, when dissolution of the corporation was effected, individual A received all the paintings on hand from X Corporation valued at $187,293 by the X Corporation. In his books, individual A debited the assets ''Paintings'' in this amount, debited ''bad debts'' for $37,388, and credited ''accounts receivable'' for $224,681.

Individual A claimed the $37,388 as a short-term capital loss deduction on his 1951 calendar year Federal Income Tax return as a nonbusiness bad debt under section 23(K)(4) of the Federal Internal Revenue Code.

SALE (Contd.)

Assuming individual A did not acquire the artwork for resale, the tax applies to the transfer of the artwork. The gross receipts are $187,293 ($224,681 less $37,388.) Clearly the moneys transferred to the X Corporation were handled by the parties as a loan. When the paintings were transferred to individual A, the transaction was handled as a transfer of title to satisfy a loan on individual A's books. Individual A took a deduction for a loan on his 1951 Federal Income Tax return.

In other words, X Corporation has transferred title to the paintings to satisfy a creditor of the corporation. This claim had to be satisfied before assets could be distributed to the two shareholders. 9/16/53.

495.0736.800 **Transfer Between Related Corporations.** Company A is planning to purchase advertising material solely from Company B, a related corporation. Both of the companies are located in California. The ownership of the two corporations is identical, but they are separate entities with different officers, bank accounts, and records. Company A will purchase advertising material (not qualifying as printed sales messages under section 6379.5) solely from Company B. Company B will have the material printed and drop shipped by the printer to a California mailing house. Another vendor will provide mailing envelopes which will be sold to Company B and drop shipped by the vendor to the same mailing house. Company B will sell the finished printed material and envelopes to Company A at a price that includes all cost, overhead, and a small mark up. As provided in the mailing instructions received by Company B from Company A, and pursuant to the contract of sale between the related companies, Company B will direct the mailing house to mail the property to recipients located in California as well as in other states.

A transfer between related parties is treated the same as a transfer between unrelated parties when the sales price includes all of the transferor's cost, including the cost of the property and any overhead expenses reasonably allocable to the cost and sale of that property. Based on facts submitted, the transfer from B to A will be treated as a sale for sales and use tax purposes.

Sales tax applies to B's sales to A of the printed material mailed to California consumers, measured by the mark-up sales price to A. B's sales to A of property shipped out of state would be an exempt sale in interstate commerce if the contract of sale requires B to ship the property outside California and the property is so shipped by facilities of the retailer or by common carrier. 1/3/95. (Am. 2001–3).

495.0736.850 **Transfer of Depreciable Assets to Subsidiary—No Consideration.** A Parent Company plans to transfer some depreciable assets (furniture, fixtures, machinery and equipment) to its wholly owned subsidiary. The Parent has paid sales tax reimbursement or use tax when purchasing this property. The Parent will receive no consideration from the subsidiary for the property. A transfer of tangible personal property for which no consideration is given for the property is not a sale or purchase. Therefore, no sales or use tax would apply to the transaction if no consideration, such as assumption of Parent's liability by the subsidiary, an intercompany debt, the cancellation of

indebtedness, or Parent's receipt of additional shares in the subsidiary, is provided by the subsidiary in exchange for obtaining ownership in the property. 5/9/96.

495.0737 **Transfer From Receiver to Bankruptcy Estate.** A receiver was appointed to operate a business when there was a dispute between the owners. The receiver did not pay the full amount of tax due to the Board and ultimately filed for bankruptcy. The owners also filed for bankruptcy and the business assets were transferred to the bankruptcy estate. Pursuant to a plan of reorganization, one of the owners took over operation of the business. The court determined that this owner is not liable for tax liability incurred during the period the receiver operated the business. There is no sale since the bankruptcy estate obtained the same assets that it would have received directly from the debtor had there been no receiver. A claim may properly be made against the receiver's bond for the amount due from the receiver. 3/29/95.

495.0738 **Transfer by Tenants in Common.** A sale does not occur upon the transfer of a vessel by the tenants in common owners to a trust in which the tenants in common are the trustees, when there are no outstanding loans on the vessel which are assumed by the trust and the transferees receive no other consideration. 4/29/91.

495.0740 **Transfer to Stockholder.** There is a transfer of property for a consideration, creating a taxable sale, when a corporation transfers equipment to a stockholder in return for his stock which stock is then retired or canceled by the corporation. 8/24/53.

495.0745 **Transfer to Stockholders.** Transfer of property to a minority stockholder in payment for his shares of stock constitutes a sale rather than a distribution of assets upon dissolution. Accordingly, the transaction is subject to tax unless it is exempt as an occasional sale within the meaning of section 6006.5. For example, if the corporation was engaged in an activity not requiring the holding of a seller's permit, the sale of property, or some portion thereof, may be exempt from tax by section 6006.5(a). 1/2/52.

495.0748 **Transfers Between Subsidiaries.** The inter-company transfers of tangible personal property between two wholly-owned subsidiary corporations of a parent corporation are balanced through the parent's equity account. It appears that the corporate parent's equity account is used as a third-party clearing account. The use of such a device does not mean there is no consideration. Rather, the benefit conferred on or detriment suffered by the parent corporation by a credit or debit to its equity account is consideration to the subsidiary corporations which, in effect, each have agreed either to transfer a benefit or a detriment to the parent in exchange for receiving tangible personal property or foregoing remuneration for that tangible personal property from the other wholly-owned corporate subsidiary of the parent. In other words, the benefit and detriment to the parent is consideration for the transfer of the tangible personal property and the resulting debt, and results in a sale. Payment of tax cannot be avoided by the use

SALE (Contd.)

of an equity account of the parent. Therefore, the transfer of tangible personal property from the one wholly-owned corporate subsidiary to the other is a sale which is subject to tax under the Sales and Use Tax Law. 1/14/97.

495.0750 **Transfers of Property.** Corporation A is a machine shop with a sole shareholder who also owns 96% of Corporation B. A and B file unitary state income tax returns with the California Franchise Tax Board. B manufactures ''packing peanuts'' used by merchandisers to protect their products in shipping containers. A manufactures sheet metal overhead storage bins to the specification of various merchandisers who purchase packing peanuts from B so that the packing peanuts can be dispersed through a tube into the packing containers below. A also fabricates and repairs tools, machinery, and equipment that B uses in its day-to-day operations.

The sole shareholder filed his 1986 personal income tax return electing ''S'' Corporation status for A who filed a separate informational federal income tax return for an ''S'' Corporation.

A's physical plant is located less than two blocks from B. The day-to-day operations of A's physical plant are supervised by a chief engineer employed by B. B maintains a blanket liability insurance policy for B and A. A maintains separate workers compensation for its employees. A's accounting services are performed by B. A maintains separate bank accounts, pays its own payroll taxes, contracts for supplies and other materials in its own name, issues its own purchase orders, and remits payment for its payroll, facility costs, rents, and other business expenses from its own bank accounts. In issuing purchase orders, A uses its own seller's permit number, issues resale certificates in its own name, and does not identify any purchase of materials or supplies to specific general work orders (GWO) issued by B. A bills B per job based on an agreed hourly cost of labor and the actual material expense incurred to complete each GWO. A's officers and directors do not draw salaries.

A believes that it and B should be treated as a single entity under the holding in *Mapo Inc.* v. *State Board of Equalization,* (1975) 53 Cal.App.3d 245, 125 Cal.Rptr. 727 so that its transfer of tangible personal property to B does not result in a sale under section 6006(b).

Numerous facts in this case and many of A's operating procedures closely parallel those in *Mapo, Inc.* supra, but the underlying facts and circumstances are clearly distinguishable from those in Mapo as follows:

(1) The firm does business with persons other than B.
(2) The firm has an independent business purpose.
(3) The firm is not wholly owned by A.
(4) The firm is not a subsidiary of A. 7/27/90.

495.0760 **Wholly-Owned Subsidiaries.** Invoices for the transfer of equipment between wholly-owned subsidiaries of a common parent constitute transfer of title to the equipment and the tax is applicable to the invoice price. 10/25/63.

495.0780 **Withdrawals of Property by Members of a Joint Venture.** A joint venture is similar to a partnership, and the withdrawals of property by the joint

SALE (Contd.)

venturers and the debiting of their respective advance accounts are transfers of title to tangible personal property for a consideration and, hence, sales of the property transferred. 7/21/53.

495.0785 **Agency Agreements.** A dump truck operator who obtains a written ''agency agreement'' with a customer may purchase sand and gravel as agent of the customer provided, as to each acquisition, he/she clearly discloses to the supplier the name of the principal for whom he/she is acting and bills the same amount paid to the supplier. The addition of an agent's fee would not constitute an increase in the amount billed for the product. If all these conditions are met the trucker would not be making a sale and would not need a seller's permit. A separately stated charge by the agent for transporting the product from the supplier to the point designated by the principal would not be considered part of the price billed, as no sale has occurred. 7/3/90.

(e) RETAIL SALE OR SALE FOR RESALE—DELIVERY BY OWNER, FORMER OWNER, FACTOR OR AGENT

Property considered used or resold, see also Use of Property in State and Use Tax Generally.

495.0800 **Changed Intention After Purchase.** A firm buys a machine for specific use in the event a certain contract is obtained and pays all sales or use taxes thereon.

SALE (Contd.)

Upon failure to obtain the contract and without any use being made of the machine, it is resold by the purchaser. Tax refund is in order as resale occurred prior to any use of the machine.

Sales tax applies, however, to the resale of the machine unless it was resold in interstate commerce and delivery effected in a manner qualifying it for exemption under Regulation 1620. 8/12/54.

495.0820 **Changed Intention After Purchase.** A corporation transferred some machinery and equipment to its president in cancellation of an indebtedness. The president placed the equipment in dead storage for more than a year, then resold it in a series of sales sufficient to require the holding of a seller's permit. HELD: The sale to the president was a sale for resale even though the president may not have intended originally to resell the property in the regular course of business. 10/5/64.

495.0840 **Changed Intention After Purchase—Voluntary Disposal Other Than by Sale.** An oil company bought business forms, stored them in the seller's warehouse, and withdrew them from the warehouse as needed. One of its forms became obsolete and the oil company withdrew copies of that form for disposal. The oil company is not entitled to a credit for sales tax reimbursement paid at the time of sale because the law makes no provision for a deduction from tax as the result of a voluntary disposal of tangible personal property by a buyer subsequent to the incidence of the sales tax. 1/28/70.

495.0843 **Deliveries by California Firearm Dealers for Out-of-State Retailers.** California residents order firearms from out-of-state retailers and the retailers ship the firearms to an authorized California firearm dealer for delivery to the customer. The California firearm dealer charges a fee to register each firearm in California.

When the California firearm dealer completes the registration paperwork and delivers a firearm to a California purchaser for an out-of-state retailer not registered with the Board as a retailer engaged in business in this state, it is presumed that the firearm dealer is the retailer of the firearm under the second paragraph of section 6007. In such a case, the firearm dealer would owe sales tax on the total amount of the retail sales price of the gun to the customer, including the Department of Justice fee if passed on to the customer, and including any service charge made by the firearm dealer.

If the firearm dealer establishes to the satisfaction of the Board that the out-of-state retailer was engaged in business in this state under section 6203, its deliveries for that retailer will not be considered taxable retail sales by the firearm dealer, even if the out-of-state retailer has not registered with the Board as a retailer engaged in business in this state. In such cases, as well as in situations in which the retailer is in fact registered as a retailer engaged in business in this state, the out-of-state retailer has a duty to collect the use tax under section 6203. The retailer should collect use tax on the invoice price of the firearm, plus the service fee, even if paid directly to the firearm dealer by the customer. Also, the Department of Justice fee passed onto the customer should be included in the measure of tax. 12/7/95. (Am. 99–2).

(Note: On and after January 1, 1999, the Department of Justice fee is not includible in the measure of tax, but all other charges remain subject to tax.)

495.0845 **Delivery to Fabricator Hired by Out-of-State Buyer.** Company A, a California business, sells property to Company B, an out-of-state business which is not engaged in business in California. B directs A to deliver the goods to C, a business located in California. C assembles the property under contract with B and, at B's direction, ships it to D (B's customer) at an out-of-state location.

Since A did not deliver the property to an end user or an agent of an end user, A is not treated as the retailer of the property pursuant to section 6007. 4/20/95.

495.0847 **Delivery to In-State Processor.** A taxpayer sells products to a buyer who is not located or registered in California. At the buyer's request, taxpayer ships the product from its out-of-state plant or from its California plant to a company in California, which will perform further processing of the product for the buyer. The processor subsequently ships the processed product to the buyer's customer. The buyer's customer may be the end user or it may resell the product. The buyer's customer may be located in California or it may be located out of this state.

In all variations, the taxpayer is not delivering the product to the end user, but to a third party who will perform further processing. The processor, in turn, will later deliver the property either to the end user or to a reseller. Therefore, section 6007 does not apply to this taxpayer. If the taxpayer documents the fact that it shipped the product to a California processor on behalf of the buyer, the taxpayer is not subject any tax liability. The processor, however, may have liability under the second paragraph of section 6007. 9/15/94.

495.0848 **Delivery by Licensed Firearm Dealer.** A California resident purchased a firearm from an out-of-state retailer who is not engaged in business in California. The California customer contacts a licensed California firearm dealer and states that he paid money to an out-of-state dealer and wishes for the dealer to have the firearm shipped to the dealer's place of business and legally transfer the firearm to him. The dealer contacts the out-of-state seller and arranges to have the firearm sent to him. Upon receipt of the firearm (prepaid by the customer), the dealer logs the firearm into his Federal Acquisition/Disposition books. The customer then fills out the State Department of Justice Firearms Dealer Record of Sale. The dealer collects the state fee of $14.00 plus a $16.00 charge to cover the dealer's expenses.

When a licensed California firearm dealer completes the registration paperwork and delivers a firearm to a California purchaser for an out-of-state retailer not registered with the Board as a retailer engaged in business in this state, it is presumed that the dealer is the retailer of the firearm. In such a case, the dealer would owe sales tax on the total amount of the sales price of the gun, including the Department of Justice fee passed on to the customer and including the dealers service charge. (Section 6007)

If the out-of-state retailer was engaged in business in this state under section 6203, the California dealer's deliveries for that retailer will not be considered

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taxable retail sales by the dealer, even if the out-of-state retailer has not registered with the Board as a retailer engaged in business in this state. In such cases, the out-of-state retailer has the duty to collect the use tax under section 6203 and that retailer should collect tax on the invoice price of the firearm plus the dealer's service charges and the Department of Justice fee that is passed on the customer. 10/26/95. (Am. 99–2).

(Note: On and after January 1, 1999, the Department of Justice fee is not includible in the measure of tax, but all other charges remain subject to tax.)

495.0849 **Drop Shipment—Out-of-State Suppliers.** A firm that is not engaged in business in California under section 6203 makes sales through the World Wide Web. It acquires the goods it sells from two out-of-state suppliers who drop ship the orders directly to the firm's California purchasers. One of these out-of-state suppliers is engaged in business in California under section 6203 while the other is not. The out-of-state supplier who is engaged in business in California is deemed the retailer under section 6007 and is required to collect use tax from the consumers measured by the price paid by the consumers to the firm. With respect to the property delivered by the out-of-state supplier who is not engaged in business in California, since neither the firm nor the supplier is engaged in business in California, the consumers must self-report their use tax liability. 6/18/97.

495.0855 **F.O.B. Clause and Drop Shipment.** California's drop shipment rules are triggered by a drop shipment made by a person engaged in business in California to a California consumer on behalf of a retailer who is not engaged in business in California. An F.O.B. provision is not relevant to the question of whether the drop shipper is re-characterized to be the retailer for purposes of section 6007. 4/3/98. (M99–2).

495.0860 **Installation of Special Equipment.** An out-of-state retailer places an order for a truck which order is filled by the manufacturer's division in California, who in turn delivers the truck to another firm in California for the purpose of installing special equipment. If the out-of-state retailer's contract was to sell a completely equipped truck and he made the agreement for installation of the special equipment in California and also arranged to transport the vehicle to his customer out-of-state, it is an exempt sale for resale. If, however, his customer made the installation contract, delivery to the installer in California would amount to delivery to a consumer and a taxable retail sale would result. 1/7/55.

495.0880 **Interstate Delivery.** On or before December 31, 1992, the second paragraph of Section 6007 applies only to a situation where the goods are delivered to the consumer in this state from a point inside this state, and not where the goods are delivered from a point outside this state directly to the consumer in this state. 7/9/59, 8/21/92.

495.0890 **Interstate Delivery.** Effective January 1, 1993, under the second paragraph of Section 6007, a seller engaged in business in California owes sales tax, or must collect use tax, when it makes a wholesale sale of property and

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makes a delivery of that property to a California consumer pursuant to a retail sale made by a person not engaged in business in California. The California wholesaler is redefined to be the retailer under Section 6007 even if he/she, in turn, purchases the property from another supplier who actually delivers, on the wholesaler's behalf, the property to the California consumer. The supplier would be liable for tax under Section 6007 only if neither the retailer nor the wholesaler were engaged in business in California. 11/12/92.

495.0893 **Interstate Delivery—Drop Shipment.** Out-of-state retailer "A," who is engaged in business in California, sold merchandise to "B," who is located out of state and is not engaged in business in California. "B" resold that merchandise to "C" who in turn resold that merchandise to a California consumer. The merchandise was shipped by "A" from an out-of-state location directly to the consumer in California.

Under section 6007, a retail sale also includes certain drop shipments. The merchandise in question was shipped from an out-of-state location directly to the consumer in California. Title passes from the vendor and, thus, the sale occurs no later than the time at which the vendor completes its performance with respect to physical delivery of the property. This generally occurs upon the seller's delivery of the property to a common carrier for shipment to the customer. Accordingly, in drop shipment sales taking place outside California, as in this case, the use tax rather than the sales tax applies. Although the purchaser is liable for the use tax, a retailer engaged in business in this State is required to collect the use tax from its purchaser and to pay the tax to this State.

The actual sale of the merchandise to the California consumer was by "C." If "C" is a retailer in business in this State, the second paragraph of section 6007 does not apply and "A" would not have any tax liability resulting from this transaction. Instead, retailer "C" would be required to collect the use tax with respect to the drop shipment of the merchandise for use in this State by the consumer. The measure of tax is the retail sales price charged to the California end-user. Since "C" did not provide "A" with a resale certificate which includes a California seller's permit number, in order for "A" to avoid being deemed the retailer with respect to the sale at issue under the second paragraph of section 6007, "A" has the burden of proving that "C" is in fact a retailer engaged in business in California. 1/17/97.

495.0894 **Interstate Delivery—Drop Shipments.** The following four scenarios cover the application of tax before and after the 1/1/93 amendment to section 6007.

(1) An out-of-state retailer not engaged in business in California takes an order from a California consumer. It orders the property from an out-of-state manufacturer which is engaged in business in California. The manufacturer ships the property directly to the consumer in California from its out-of-state location.

Prior to 1/1/93, the sale from the out-of-state manufacturer is not a sale in California and, thus, section 6007 does not apply. The manufacturer's sale is a sale for resale. On and after 1/1/93, the second paragraph redefines a sale which

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would otherwise be regarded as a sale for resale to be a retail sale when a person drop ships property to a California consumer pursuant to a retail sale made by a retailer not engaged in business in California. In this first scenario, effective 1/1/93, the out-of-state manufacturer will be regarded as the retailer and will be required to collect the use tax from the purchaser and pay it to this state. The measure of tax will be the retail price which is the marked up price paid by the California consumer.

(2) Same as scenario #1 except that the retailer orders the property from a California sales office of manufacturer who also has manufacturing and warehouse facilities in California. However, in this instance, the manufacturer ships the property by common carrier from one of its out-of-state warehouses directly to the consumer in California.

The tax consequences are the same as discussed in scenario #1 above. Prior to 1/1/93, although the consumer would owe use tax, the California seller, the manufacturer, would not be responsible for collecting the tax since the sale occurs outside California.

(3) Same as scenario #1 except that the retailer orders the property from a California wholesaler, who in turn places an order with an out-of-state manufacturer not engaged in business in California. The manufacturer ships the property directly to the consumer in California by common carrier, F.O.B. shipping point.

Prior to 1/1/93, none of the parties have responsibility to report tax other than the consumer. However, on and after 1/1/93, the California wholesaler will be defined as the retailer under section 6007 and will be responsible for collecting use tax measured by the marked up price paid by the California consumer.

(4) Same as scenario #3 except that the manufacturer is engaged in business in California.

The answers remain the same as in scenario #3.

With regard to resale certificates, a California seller who drop ships to a California consumer pursuant to a retail sale by another could not avoid the application of the second paragraph of section 6007 by accepting a resale certificate that omitted a California seller's permit number. Such a certificate indicates that the out-of-state retailer is not engaged in business in California. The acceptance of such a certificate would not relieve the California seller of liability for sales tax under the second paragraph of section 6007.

The corollary to the rule mentioned above is that a person who drop ships property to a California consumer and who accepts in good faith a valid and timely resale certificate that includes the purchaser's valid California seller's permit number is not liable for sales or use tax on the sale. This is consistent with relevant statutes and the regulation. (Sections 6091, 6241, and Regulation 1668). 11/12/92. (Am. M99–1).

495.0897 **Out-of-State Buyer and Seller.** A Texas company orders furniture from a manufacturer located in Michigan. The Texas company directs that shipment be made from the Michigan factory to its retail customer in California.

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The Michigan manufacturer has offices in California and thus is a retailer engaged in business in California. The Michigan manufacturer is liable for collection of use tax on the retail selling price of the furniture. If the customer has already paid use tax directly to the state, tax need not be paid again but the Michigan manufacturer is responsible for establishing that tax has been paid. 4/7/95.

495.0920 **Out-of-State Delivery for Resale.** Where a California seller sells trucks to an out-of-state dealer for resale purposes, and seller's driver drives the truck to the buyer's place of business without the aid of any employee or representative of the buyer, the seller does not incur tax liability under the second paragraph of Section 6007. This would also be true if the ultimate consumer reimburses the out-of-state dealer for fuel and other operating expenses including wages, meals and hotel accommodations of the driver, provided the driver is in no sense the consumer's agent. Likewise, no tax liability would accrue as to parts sold to such out-of-state dealer for resale and delivered in the same truck. 3/30/55.

495.0940 **Purchase in Transit.** When an out-of-state dealer sells a truck to a foreign purchaser, title to vest upon delivery to destination, and in transit purchases in California an additional part for such truck, the purchase of the part is a sale for resale as the part becomes a component part of the truck and is not taxable. 10/5/53.

495.0944 **Purchasing Agent.** A taxpayer proposes to enter into an agreement whereby it would act as purchasing agent for a hospital district. The taxpayer would purchase supplies on behalf of the hospital, warehouse all the supplies at its facilities until needed by the hospital, mark and identify those supplies as for the hospital, maintain insurance naming the hospital as an additional insured, pay vendors, and be responsible for late charges, interest, and price changes arising from the taxpayer's late payments.

The hospital is to pay the taxpayer the cost of supplies from the vendors and will be invoiced upon delivery to the taxpayer's facilities. Payment will be due 26 days after the date of delivery to the hospital facilities. Also, the taxpayer guarantees no more than a maximum price will be billed to the hospital for the supplies. The taxpayer will be paid a set fee for performance of the requirements of the contract.

Based on the provision of the contract, the taxpayer is not acting as the hospital's agent, but rather is purchasing supplies for resale to hospital. As an agent, the billing to the hospital must be the same as paid by the supplier. Under the contract, not more than a stated maximum amount will be billed to the hospital. Thus, if the amount paid to the supplier exceeds the maximum, the taxpayer absorbs the difference. Additionally, the taxpayer is responsible for late charges, interest, price changes arising from late payments, and the hospital does not pay the taxpayer until 26 days after supplies are delivered to the hospital. Accordingly, it is in effect financing the hospital's purchases. Also, the taxpayer is making purchases through a group purchasing arrangement. Finally, the

contract specifies that warehoused goods are marked ‘‘held for X hospital.’’ Under an agency arrangement, the goods would be the property of the hospital not merely ‘‘held for.’’ All of the above factors results in a conclusion that the contract is a contract to buy and sell and not an agency contract. 5/10/88.

495.0950 **Records Furnished By a Dealer To Radio Stations At the Request of His Supplier.** Retail sales are made by a wholesale record dealer when, at the request of his supplier, he distributes records to radio stations, without any charge to the stations by the dealer or his supplier, with the understanding that the supplier will furnish replacement records to the dealer. 6/7/72.

495.0952 **Resale Certificates With Respect to Drop Shipments.** A taxpayer makes sales to an out-of-state corporation which is not engaged in business in California. The out-of-state customer directs that goods be drop shipped to California entities. The taxpayer is deemed the retailer under section 6007 unless the California customer is purchasing the property for resale. The taxpayer is not relieved of liability for tax by its acceptance of a resale certificate from the out-of-state retailer that lacks a valid California seller’s permit number. The taxpayer will be relieved of liability for tax, however, if it accepts a timely valid resale certificate in good faith from the California customer of the out-of-state retailer. 12/14/93.

495.0953 **Resale Certificate Issued with Respect to Drop Shipments.** Corporation A is a California seller. A related out-of-state Corporation, Corporation B, purchases tangible personal property for resale to out-of-state Corporation C. Neither B nor C is engaged in business in California. C resells the property to its parent, D, which is located in California, and directs that A deliver the property to D in California. D proposes to issue a resale certificate to A.

If A takes the resale certificate from D in good faith, A will not be liable for tax on the transaction under section 6007. 7/5/94.

495.0960 **Supplies for Crew, Purchasing as Agent Rather Than for Resale.** The application of sales tax to the sale of beer, wine, and other non-food items for consumption by crews of fishing vessels while at sea, is as follows: On a typical fishing vessel the crew consists of the three owners and nine hired crewmen. The total grocery expense for food and other items consumed by the twelve men while at sea is divided by twelve. This amount is then charged against each man’s share from the voyage. Each man pays the same amount without regard to the value or cost price of items actually consumed by him.

The owners of the boat should not be regarded as reselling these items to the members of the crew. The transaction appears instead to be analogous to a situation whereby A, B and C are going on a picnic and they agree that A will buy the beer and that B and C will each pay A one-third of the cost of the beer. In such case A is acting as agent for B and C in purchasing this beer for them and A is not regarded as selling the beer to B and C. Accordingly, the sale of nonfood items to the owners of the fishing vessel is a taxable retail sale and not sale for the purpose of resale. 9/5/52.

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495.0980 **Wholesaler Selling for Retailer.** When a wholesaler acts on behalf of a retailer and delivers merchandise directly from his warehouse to the customer, collects the sales price, delivers the merchandise to the customer, treats the sale as a sale to the retailer and remits the profit to the retailer, the wholesaler should not report the sale as a part of his taxable gross receipts. He should remit the sales tax reimbursement to the dealer and take a resale certificate from him. 8/25/58.

500.0000 SALES TO COMMON CARRIERS—Regulation 1621

500.0020 **Air Charter Service.** An air carrier (other than a supplemental air carrier) holding a certificate of public convenience and necessity may perform charter trips as a common carrier without regard to the points named in its certificate under regulations prescribed by the Civil Aeronautics Board. (Title 14, Code of Federal Regulations, Part 207.) Thus, sales to such carriers may be exempt from sales tax under Section 6385 even though the shipment from California is not between points named in the certificate of public convenience and necessity, provided, the shipment is between points where charter service is authorized. 6/21/66.

500.0025 **Aircraft Cargo Containers.** Igloos are large empty thin walled containers into which air common carriers place parcels and other property. During use in the aircraft, they are fastened inside the aircraft. These containers are ''used by the carrier in the conduct of its business as a common carrier'' as required by Regulation 1621. The sale of these cargo containers will be exempt from tax if the other requirements set forth in Regulation 1621 are met. One of the other requirements is that the property not be put to use until after the transportation outside the state. 8/21/90.

500.0025.400 **Aircraft Fuel—Immediate Shipment or Storage.** An international airline constructed an underground fuel storage facility which it intends to lease to a major oil company from which fuel will be sold to the airline, for immediate shipment to a foreign destination. However, the contract is titled ''Terminalling Agreement'' rather than lease. Further, the terms of the contract specify that the operator of the facility will be under the control of the airline, refer to the fuel being in the airline's custody, and state that all risk of loss is with the airline. In these circumstances, sales into the storage facility cannot be considered to be for immediate shipment, but rather for storage. The exemption in Regulation 1621(b) does not apply. 6/8/88.

500.0026 **Aircraft Fuel Sales.** An airline purchases fuel which is delivered to a storage system owned by the airline. Since the fuel is not delivered to tanks of an aircraft for immediate use, the sale is not exempt pursuant to Section 6357.5. 2/23/95.

500.0029 **Beverages Served by Foreign Air Carrier.** Federal law does not preclude the application of the sales or use tax to sale of alcoholic beverages served to passengers as complimentary drinks or sold to passengers by a foreign air carrier while in flight over the state of California.

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The fact that United States Custom directive No. 3200.04 accords duty free and tax free status for liquor consumed in flight does not preclude the application of the sales and use tax because the liquor had been removed from bond and was not otherwise exempt from state taxation at the time the taxable event occurred. 1/27/92.

500.0030 **Beverages Served On International Flights.** Neither Article 24(a) of the Chicago Convention on International Civil Aviation of 1944, nor the customs laws and regulations of the United States (specifically 19 U. S. C. Section 1309), prohibit the imposition of tax on complimentary alcoholic beverages served or sold to passengers during flights into and out of California airports. 7/9/93.

500.0040 **Bill of Lading.** Correction of a bill of lading for the sole purpose of changing the transaction retroactively to meet the requirements of Section 6385 is not recognized as an effective procedure. 5/16/55.

500.0049 **Bunker Fuel.** A company purchases fuel in this state. The fuel was used on a vessel which the company had obtained under a time charter with the owners. Under the time charter, the company was responsible for furnishing the fuel for the operation of the vessel.

The company did not purchase the fuel as agent for the vessel owner nor was the fuel purchased for resale. The fuel is best characterized as "customer furnished fuel." The sale of the fuel to the company does not qualify for the section 6385 exemption because it was not sold to a common carrier. Neither does it qualify as a sale in interstate commerce. The fuel was purchased for use in a voyage embarking from a California port and is subject to tax. 4/6/88.

500.0050 **Bunker Fuel.** A trading company also operates a bunker business. The company never uses any fuel oil or Marine diesel for its own use. All business transactions are strictly paperwork. As the vessel owners do not have credit with the suppliers, they hire a broker. The broker will use a trading house, like this company, to buy the fuel from the supplier, on the trading house's account. The trading company will in turn sell it to the vessel owner.

The trading company is a retailer of the bunker fuel and the measure of tax would include any charges for overtime and any other additional charge related to the sale of the fuel. Any charge for barging also would be subject to tax unless it meets the requirements of separately stated charges for transportation (see Regulation 1628). The entire charge is subject to sales tax, with the possible exception of the transportation charges. 5/14/92.

500.0054 **Cargo Containers.** Cargo containers (a.k.a. igloos) are large, empty, thin-walled, enclosed containers into which the common carrier places parcels and property. When used, the cargo containers are filled and loaded into the fuselage of an aircraft. The containers are custom designed to the specification of the carrier. During use in the carrier's aircraft, the containers are fastened inside the aircraft. The common carrier in this case purchases empty containers and ships them empty to its out-of-state location.

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The exemption provided by section 6385 applies to all property, except fuel and petroleum products, used by the carrier in the conduct of its business as a common carrier if the sale satisfies the requirements of the exemption. The sale to the carrier will be exempt if the requirements of Regulation 1621(b)(1) and proof of exemption described in Regulation 1621(c)(1) are met. 8/21/90.

500.0056 **Commercial Fishing Vessels.** A commercial fishing vessel carrying passengers for purposes of sport fishing could qualify as a common carrier under section 6385(a) if goods are shipped by the seller via the purchasing carrier under a bill of lading to a point outside this state and the property is actually transported to the out-of-state destination. However, fuel consumed in a sport fishing trip that commences and ends in California would not be shipped by the seller . . . "via the purchasing carrier . . . to a point outside this state." Accordingly, the exemption does not apply. 12/14/82.

500.0060 **Contract Carrier.** A taxpayer sells property to a corporation, one division of which is an authorized contract carrier. The property sold is delivered in California to the contract carrier division of the buyer. The property is transported to Florida by the contract carrier division for use by another division.

The sale is not an exempt sale in interstate commerce because the property was delivered to the buyer in this state. Further, section 6385 of the Revenue and Taxation Code is inapplicable because it exempts only sales to common carriers. 5/4/90.

500.0073 **Exemption Under Regulation 1621(b)(1).** When a sale to a common carrier does not follow the conditions set forth in subdivision (b)(1)(A) through (b)(1)(D) of Regulation 1621, the sale of tangible personal property to that common carrier is not an exempt sale pursuant to section 6385. All of the conditions under subdivision (b)(1) must be met for the exemption to apply. 9/19/95.

500.0080 **Fuel Exemption Registration.** The exemption under section 6385(c) does not apply if the purchasing carrier does not have a valid seller's permit or valid fuel exemption registration number at the time of purchase and does not obtain a fuel exemption registration number within 45 days after purchasing the fuel. 11/15/90.

500.0084 **Fuel for Immediate Shipment.** To be exempt from sales tax, fuel must be sold for immediate shipment by the purchasing carrier. This requirement is not violated by the delivery of the fuel into a refueler truck from which the fuel is then delivered directly into the conveyance. The requirement is also met in a case in which the fuel is transported via pipeline from the seller's storage facility through an "isolation valve" to the carrier's fueling hydrant, with title to the fuel passing at the isolation valve. The fuel in the pipeline between the isolation valve and the hydrant is considered to be in the delivery system, not in storage, provided the pipe is not deliberately designed to be wider or longer than necessary to the extent that it would be a storage facility. 6/6/89.

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500.0090 **Fuel Sold to Air Common Carriers.** Sales of fuel to an air common carrier for immediate shipment or consumption in its business as an air common carrier on a flight whose first destination is a foreign destination is exempt from sales tax. A sale of fuel for consumption on a flight to either Alaska or Hawaii would not qualify for the exemption, and that sale would be subject to sales tax. 8/3/92.

500.0120 **Hotel,** operation of by steamship company is not part of its business as a common carrier, within the meaning of Section 6385 of the Sales and Use Tax Law. 10/9/50.

500.0122 **Ice Cubes Used in Complimentary Drinks.** Ice cubes sold to airlines for the purpose of placing them in complimentary drinks for passengers are not being resold by the airlines, but rather consumed by the airlines. Thus, ice cube sales to airlines for such purposes are subject to sales and use tax. 10/4/94.

500.0123 **Information Required on Certificate E.** Certificate E in Regulation 1621 contains 17 inquiries formulated to obtain the information necessary to verify that a water common carrier meets the specific requirements to qualify for the exemption accorded under section 6385(c). In a situation where a purchaser does not want to release information regarding the quantity of fuel on board at time of arrival in port, the amount of fuel to be consumed while in port ,or the amount of fuel to be consumed to reach the first out-of-state destination, the purchaser is not entitled to the exemption provided under section 6385.

Certificate E must be obtained either within the seller's normal billing and payment cycle or 45 days from the date of delivery, whichever event occurs later is to be considered ''timely filed'' (Regulation 1621(c)(3)). However, Regulation 1621(d)(3) provides that in the event an exemption certificate is not received within the time permitted, the seller may nonetheless be relieved of sales tax liability if the seller presents satisfactory evidence that the sale met the requirements of section 6385(c). The evidence required in this situation should provide at least the same information elicited by Certificate E, not less. 1/27/97.

500.0130 **Pallets Sold to a Common Carrier.** A blanket certificate of exemption issued by a carrier for pallets is not sufficient to relieve the seller of liability for tax. If the sale meets the requirements of the exemption for sales to common carriers (Section 6385 and Regulation 1621), the seller must obtain and retain a timely exemption certificate which is substantially in the same form as required by Regulation 1621 and a bill of lading or copy thereof which meets the requirements of this regulation.

If the pallets are nonreturnable containers and the carrier is claiming that it is filling the pallets with contents which it sells, the seller must obtain an exemption certificate in accordance with Regulation 1667. 3/24/95.

500.0145 **Sale of Part of An Aircraft.** A manufacturer of aircraft parts is contracting with a common carrier for the sales of an ''aircraft.'' The common carrier will purchase the ''aircraft'' without any engines being furnished by the manufacturer and, instead, will furnish its own engines.

SALES TO COMMON CARRIERS (Contd.)

The delivery of the aircraft in California will occur under one of the following three fact patterns:

(1) The purchaser will take delivery after manufacturer installs the purchaser's engines onto the aircraft.

(2) The purchaser will take delivery after a contractor other than the manufacturer installs the purchaser's engine onto the aircraft.

(3) The purchaser will take delivery of the aircraft with engines being loaned by the manufacturer. The purchaser will then have its own engines installed elsewhere and return the loaned engines to the manufacturer.

In each of these cases, the proposed sale of the airframe with installed engines to a common carrier, as described above, would qualify as an exempt sale of an aircraft pursuant to section 6366. 4/28/86.

500.0160 **Tankers.** ''Tankers'' come within the term ''any vessels'' engaged in transporting persons or property in interstate commerce, under Section 6385. 9/19/63.

500.0180 **Tramp Steamers.** Tramp steamers have no greater exemption than that granted to other common carriers. The tax still applies to fuel which will be consumed en route between California and the first port of call. 10/7/63.

500.0200 **Use of Vehicle to Transport Payload.** When a carrier gives an exemption certificate for a vehicle purchased, claiming exemption under Section 6385, but uses the vehicle to transport a payload to a point outside the state, the carrier is liable for sales tax notwithstanding the vendor, under the decision in *H-R Truck & Equipment Co.* v. *State Board of Equalization,* 166 Cal.App.2d 378, would not be liable if he had no knowledge of the fact that the carrier made such a use of the vehicles. Such a use of the vehicles is incompatible with the exemption when claimed by the carrier. 2/16/65.

500.0450 **Vessels.** The exemption afforded to common carriers by section 6385 applies equally to watercraft contract carriers by virtue of the wording in sub-paragraph (e). This paragraph also requires that the carriage be provided for compensation, which precludes voyages of vessels owned by the shipper whether directly or by a division. Such an arrangement could not be construed as the providing of carrier service for compensation. The carrier must be an entity separate from the shipper, such as a separate corporation, even if it is wholly owned by the shipper. The exemption must be supported by the required bills of lading and exemption certificates, whether the carrier is classified as common or contract. 1/8/85; 7/10/96.

505.0000 SALES TO THE UNITED STATES AND ITS INSTRUMENTALITIES—Regulation 1614

See United States Contractors. Funeral services paid for by the United States, see Morticians. National banks, sales to, see also Banks and Insurance Companies.

SALES TO THE UNITED STATES, ETC. (Contd.)

(a) IN GENERAL—AGENCIES QUALIFYING FOR SALES TAX EXEMPTION

505.0020 **Aero Clubs.** Air force base aero clubs organized under Air Force Regulation 215–12 are instrumentalities of the United States, and sales to such clubs are exempt. 5/27/60.

505.0025 **Agent of the National Potato Board.** A photographer sold photographs to a firm which claimed to be acting as agent for the National Potato Board (an instrumentality of the United States). The firm paid the invoice with its own check and presented the photographer with a letter sent to the firm stating: ''The (firm) is authorized as agent to purchase property for the National Potato Promotion Board for use in furtherance of the Board's advertising, research and public relations activities on behalf of the United States' potato industry.''

The fact that the firm paid the invoice with its own check suggests that the firm purchased the photographs on its own account or for resale rather than as an agent of the Potato Board. As stated in Regulation 1614(a)(4), when the nonexempt party makes full payment and later seeks reimbursement, then that party and not the United States government is considered the actual purchaser of the property. If the firm is the retailer of the photographs rather than an agent of the Potato Board and if title passed to the Potato Board prior to any use by the firm, the firm could purchase the property ex-tax for resale by issuing to the photographer a timely and valid resale certificate. 12/7/93.

505.0040 **Air Base Skeet and Trap Club.** The Travis Air Force Base Skeet and Trap Club was held to be exempt from sales tax under Section 6381(a) of the Revenue and Taxation Code as an unincorporated instrumentality of the United States Government under the control of the Secretary of the Air Force and the Commander of the Travis Air Force Base. 6/11/65.

505.0045 **Air Force Academy Athletic Association.** The Air Force Academy Athletic Association (AFAAA) qualifies as an unincorporated instrumentality of the United States. The Charter of the AFAAA activities are the responsibility of the Superintendent of the Air Force Academy. Sales to the AFAAA are exempt from sales tax. 8/6/90.

505.0060 **Amtrak.** Although not a United States instrumentality, Amtrak is exempt from state sales or use taxes pursuant to Federal Law, 45 U.S.C. Section 546b. Therefore, sales to Amtrak are exempt from sales or use tax under Section 6352. 10/9/91.

505.0070 **Car Rentals by Federal Employees.** California sales tax does not apply to automobile rentals made to employees of the United States government traveling on government business if the vehicle was rented under a General Services Administration rental contract. It is immaterial for tax purposes whether the federal government is billed directly or the employee pays the bill and is later reimbursed. 9/2/76.

SALES TO THE UNITED STATES, ETC. (Contd.)

505.0071 **Catering Functions for Groups from the Federal Government.** A major hotel performs catering services for groups from the federal government (i.e., Air Force, Department of Defense, Red Cross). In order for the hotel's sales to such groups to be exempt, the hotel must substantiate that the purchases are official purchases of the United States (or U.S. instrumentality) and that the groups are authorized by the United States to purchase the catering from the hotel on behalf of the United States in accordance with Regulation 1614. If the caterer is unable to acquire sufficient proof that the purchases are official purchases of United States, the sales to such groups are regarded as sales to individual employees of such organizations and are properly subject to sales tax. 7/3/96.

505.0072 **Checks Sold by a Federal Credit Union.** A military federal credit union, with a main office in this state, operates branches throughout the Far East. The branches use an APO San Francisco, as an address. Any organization/individual using this address is not physically located in California.

It is assumed that the federal credit union is the retailer of the checks. As a matter of state law, the incidence of sales tax is on the retailer. Since a federal credit union is exempt from sales tax, the retail sales of checks in California by the federal credit union are also exempt from sales tax. Since the federal credit union's sales are exempt from sales tax, use tax applies when the checks are purchased for use in California. When the use tax applies, the federal credit union is required to collect that use tax from its customers and remit the tax to the state. It is presumed that mail addressed to the APO is forwarded outside California. This means that checks mailed to a customer through the APO address are presumed to be purchased for use outside California and not subject to use tax. Records showing names and addresses as they appear on the mailed matter must be kept as evidence of the mailing. 12/18/86; 3/2/88.

505.0073 **Chapa De Indian Health Program.** Pursuant to Public Law 93-638 Chapa De Indian Health Program is an executive agency of the United States when carrying out the purpose of a contract with the Indian Health Service in connection with Public Law 93-638. As a result, sales of medical equipment to Chapa De are exempt from tax under section 6381(a). 2/5/96.

505.0075 **Civil Air Patrol.** Sales to the Civil Air Patrol (CAP) are exempt from sales tax because the CAP is an instrumentality of the United States for purposes of immunity from state taxation. 8/19/87.

505.0080 **Civilian Welfare Funds.** Civilian Welfare Funds at Air Force bases, if properly conducted and operated in accordance with Air Force regulations, are unincorporated instrumentalities of the United States, and sales to such funds are exempt from tax. 12/12/62.

505.0100 **County Agricultural Conservation Association.** Such an association, formed under Federal law for the purpose of cooperating with the United States Department of Agriculture is an exempt agency or instrumentality of the United States. 8/7/52.

SALES TO THE UNITED STATES, ETC. (Contd.)

505.0115 **Employee's Reimbursable Expenses.** Reimbursable employee expenses purchased with a U.S. contractor's credit card and properly charged to an overhead account are allowable as sales to the United States pursuant to the *Aerospace* decision. 7/15/92.

505.0118 **Fannie Mae.** The Federal National Mortgage Association (Fannie Mae) is an incorporated instrumentality of the United States. Sales tax does not apply to sales to it. 10/21/88.

505.0119 **Farm Credit Banks.** Farm credit banks are exempt from state taxation under Federal law (12 U.S.C. S2023). Accordingly, sales to farm credit banks are exempt from sales tax even though the Farm Credit Banks are not actually instrumentalities of the United States. Banks claiming exemption should issue exemption certificates stating that they are exempt under 12 U.S.C. 2023. 11/9/93.

505.0120 **Farmers—Soil Conservation Act.** Sales of materials under the Soil Conservation Act for which the farmer and the United States Government are separately obligated to pay respective portions of the purchase price are sales to the United States as to that portion paid for by the government. 8/21/50.

505.0140 **Federal Housing Administration.** The FHA is an unincorporated instrumentality of the United States. Accordingly, sales to this agency are exempt from sales tax. 9/21/66.

505.0160 **Federal Housing Administration—FHA-Owned Property and Funds.** Purchases of supplies and equipment used by a private realty company to manage foreclosed property held by the Federal Housing Administration are exempt as sales to the United States because the United States paid for the purchases and all purchases were made by purchase orders approved by the FHA. 4/14/70.

505.0175 **Federal Public Defenders of San Diego—Resales to U.S. Government.** Federal Public Defenders of San Diego, Inc. is a nonprofit corporation established under the Criminal Justice Act. The grant from the Judicial Conference of the United States provides that all property purchased with grant funds costing more than $100 belongs to the United States and may not be disposed of except as specified in the grant.

Purchases of items costing more than $100 are therefore purchased for immediate resale to the U.S. Government and are nontaxable sales for resale followed by exempt sales to the United States. Purchases of items costing less than $100 are not for resale and the gross receipts of the retailer are subject to sales tax. 10/19/84.

505.0190 **Federal Savings and Loan Associations.** Sales to federal savings and loan associations, federal savings banks and federal savings associations are taxable regardless of the decision by the United States Supreme Court in *Diamond National Corp., et al.* v. *State Board of Equalization,* since 12 U.S.C.

SALES TO THE UNITED STATES, ETC. (Contd.)

§1464(h) simply provides that such associations shall not be subject to state or local taxes greater than imposed on similar local institutions. 5/27/76.

505.0192 **Federal Savings and Loan Insurance Corporation.** The Federal Savings and Loan Insurance Corporation (FSLIC) is a corporation wholly owned by the United States. Sales to the FSLIC are therefore exempt from tax. 5/12/87.

505.0200 **"General Agent" for an instrumentality of the United States.** Section 6381 of the Sales and Use Tax Law exempts from the sales tax sales to the "United States, its unincorporated agencies and instrumentalities." Since the National Shipping Authority is a unit within the Department of Commerce, sales to the Authority are exempt. Accordingly, sales of petroleum products to a General Agent, Agent for the National Shipping Authority are exempt from the California sales tax. 2/4/52.

505.0220 **Guam.** Sales to the Government of Guam, an agency of the United States, are exempt from tax. 5/19/59.

505.0223 **Installation Club System.** The National Training Center at an Army base will commence operations of an Installation Club System, consisting of four revenue generating operations: three clubs (officer, noncommissioned officer and enlisted) and one packaged beverage retail store on or about April 1, 1981. These facilities will operate as federal instrumentalities.

To the extent the proposed Installation Club System is established pursuant to Army Regulation 260–1, it will be considered to be an instrumentality of the U.S. Government and tax will not apply to its sales to customers at the three clubs and the package liquor store. Tax also will not apply to sales by California retailers to the three clubs and liquor store. 3/31/81.

505.0225 **Instrumentalities of the United States.** The following are instrumentalities of the United States and exempt from sales tax under Regulation 1614.

Federal Land Bank Association Federal Home Loan Mortgage Corporation Federal Intermediate Credit Banks Neighborhood Reinvestment Corporation Export-Import Bank Federal Financing Banks. 7/1/83.

505.0226 **Instrumentalities of the United States.** The Federal Deposit Insurance Corporation as an incorporated agency of the United States was appointed receiver for a bank closed by the State Superintendent of Banks. FDIC continued to lease equipment under lease by the bank to various lessees. The tax on the leases is a use tax imposed on each lessee but the lessor has the responsibility to collect the tax from the lessee at the time the rentals are paid. The fact that FDIC is an instrumentality of the United States does not excuse it from this collection pursuant to section 6204 obligation (since the tax is not imposed directly on it), even if the tax was not collected from the lessee. 7/29/81.

505.0230 **Job Corps Centers.** Effective October 16, 1986, pursuant to 29 USCA 1707, a sale of tangible personal property to or by, or purchase of tangible personal property by, the operator of a Job Corps Center, program, or activity

SALES TO THE UNITED STATES, ETC. (Contd.)

under contract with the U.S. Department of Labor is exempt from sales or use tax. Such exemption applies even though the tangible personal property will be used to improve real property within Sections 6007.5 and 6384. Such exemption is not retroactive. For periods prior to October 16, 1986, sales by a Job Corps Center, program, or activity were taxable, and sales to or purchases by a Job Corps Center, program or activity were taxable unless title to the tangible personal property passed from the Job Corps Center, program, or activity to the United States prior to use, and the tangible personal property was not used in improving real property. 6/12/87.

505.0235 **Leases to Government Contractor.** Generally, property leased to a government contractor is not exempt because the lessee is the contractor, not the United States. The exemption for sales to the United States would apply only if the property was leased ex-tax by the contractor and then subleased to the United States. The fact that the contract with the United States would require the contractor to lease such equipment, in order to perform the contract, is not a sufficient basis to conclude that the property is leased to the United States. 6/3/91.

505.0240 **Military Food Contracts.** Sales under military food contracts for meals served to members of the armed forces are sales to the U.S. Government and are tax exempt. 11/27/63.

505.0250 **National Committee for Employer Support of the Guard and Reserve.** The National Committee for Employer Support of the Guard and Reserve (NCESGR) was established by the Department of Defense as an operational committee, which is not a corporation. Accordingly, it is a federal instrumentality and sales to it are exempt from sales tax. 3/31/88.

505.0260 **National Guard.** Sales of property purchased from funds administered by the Department of the Army and the Air Force National Guard Bureau for the support of the California National Guard are exempt sales to the United States when the purchase documents clearly indicate that the purchaser is the United States and that the funds from which payment is made are actually appropriated Federal funds. 4/28/61.

505.0270 **National Potato Promotion Board (NPPB).** The National Potato Promotion Board (NPPB) has all of the establishment history and duties and authorities to classify it along with many other such boards and committees as an unincorporated agency or instrumentality of the United States. Sales to it are exempt from both sale and use taxes, and the NPPB may certify in writing to vendors pursuant to section 6421 that sales to it are exempt from tax pursuant to section 6381. The exemption in section 6421 applies to sales made directly to NPPB or a duly authorized agent purchasing for NPPB's account. 11/9/78.

505.0300 **Post Restaurants and Cafeteria Associations.** Civilian post restaurants and cafeteria associations organized and operated under regulations of the armed services are agencies or instrumentalities of the United States and sales to or by such restaurants or associations are exempt from tax. 10/27/59.

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505.0325 **Red Cross Disbursing Orders.** The American Red Cross issues disbursing orders to disaster victims. The orders authorize merchants to deliver described articles or services to a specific disaster victim. They are nontransferable. Merchants who accept them submit orders to the Red Cross and the Red Cross makes payment. The sales are regarded as being to the Red Cross and are exempt from tax. 1/27/94; 5/29/96.

505.0330 **Resolution Trust Corporation (RTC).** RTC when acting in the role of a conservator, is regarded as an incorporated agency or instrumentality of the United States, and sales to the RTC, including leases, are exempt from California sales and use tax. However, tangible personal property purchased from an incorporated agency or instrumentality, such as the RTC, is subject to use tax. If the property is purchased for use in California, use tax must be collected by RTC. The RTC was created to replace FSLIC as receiver for failed thrifts. The context and language of its cretion, to act in the place of FSLIC, makes it clear that RTC shall be treated the same as the FDIC and FSLIC (12 U.S.C. Section 1421 et seq.).

When acting as a receiver, the RTC is immune from all state and local taxation. State and local taxing authorities may only tax the RTC if it consents to such taxation, by waiver of the immunity. Congress has expressly waived this immunity for state and local ad valorem real property taxes. 4/16/91; 1/22/92; 2/1/93.

505.0332 **Sales by the American Red Cross.** The following sales or activities conducted by the American Red Cross and its chapters together with a discussion of the application of tax to these functions are set forth below.

(1) Health, Safety, and Emergency Preparedness Materials. In connection with its health, safety, and emergency preparedness training, the Red Cross sells instructional books, pamphlets, disaster kits, and first aid kits. It also sells devices to prevent the transmission of disease, e.g., face shields, pocket marks, and mouth barriers, as an integral part of CPR training. Section 6409 provides an exemption for the use of health and safety educational materials and insignia ''routinely sold in connection with health and safety and first aid classes,'' sold or purchased by a qualified organization such as the Red Cross. The term ''in connection with'' is regarded as much broader than a phrase such as ''related to.'' It does not imply that the purchase or sale of such materials must be made as part and parcel of the classes which is implied by the latter phrase but rather that those purchases or sales must be associated with or pertinent to such classes. It is concluded that sales of such items made as a direct result of specific Red Cross training and educational programs fall within the exemption provided by section 6409.

(2) Insignia/Recognition Items. The sales of T-shirts, hats, sweats, pens, patches, nameplates/tags all bearing the Red Cross emblem are primarily sold to Red Cross volunteers and paid staff for the express purpose of identification when on a Red Cross assignment. The Red Cross customer's purchases of the above items are not subject to use tax as long as they bear the Red Cross emblem.

(3) Promotional Items. Items such as mugs, ball point pens, ties, scarves, backpacks, watches, key chains, greeting cards, special event T-shirts all bearing

SALES TO THE UNITED STATES, ETC. (Contd.)

the American Red Cross emblem are frequently purchased by the chapter for the purpose of recognizing a volunteer. They may also, however, be made available for purchase in some chapters as a promotional item. Similar to insignia/recognition items, the customer's purchases of promotional items from the Red Cross are not subject to the use tax as long as they bear the Red Cross emblem.

(4) Auctions/Fundraising Events. Some chapters may be involved in fundraising auctions. Sometimes these are held on behalf of someone else on non-Red Cross property, other times these events are held at the Chapter, or there may be a combination of these two situations. The items are donated to the organization with the understanding by the donor that the item will be auctioned off to the highest bidder with the proceeds of said auction benefiting the humanitarian work of the American Red Cross. The exemption provided by section 6409 does not extend to donated items with the intent that they be sold to raise money. Sales for the purpose of fund raising do not qualify for the general exemption for sales by charitable organizations under Regulation 1570. The Red Cross must collect use tax on its customers' purchases of such donated items at such sales. If items bearing the Red Cross emblem are sold at auction, the purchases of these items from the Red Cross are not subject to the use tax.

(5) Special Events. Red Cross chapters frequently participate in special events like health fairs and community events for the express purpose of building health and safety awareness by providing health and safety information, materials, and recognition items, often for sale. The chapters need not have a seller's permit to sell items of a type that regularly bear the Red Cross emblem, e.g., T-shirts, pencils, jackets, etc. When selling donated items and items that are not of a type normally bearing the Red Cross emblem (e.g., a chapter cannot put the emblem on a donated car in order to try to get the exemption) at auctions, fundraising and special events, the chapter must obtain a temporary permit for that event. If the chapter participates in a large number of these events during the year, it may be more efficient to obtain a seller's permit rather than many temporary permits. A Red Cross chapter may issue resale certificates to vendors for items whether or not the chapter's resale of the items is subject to use tax. 10/29/93.

505.0333 **Sales of Equipment to Office of a Former President.** Sales of equipment to the office of a former president, which are paid for by a check drawn on the U.S. Treasury, qualify as sales to the U.S. Government. Such purchases are made by the General Service Administration pursuant to funds appropriated by Congress. 3/30/90.

505.0335 **Service Corps of Retired Executives (SCORE).** SCORE is an unincorporated Federal instrumentality exempt from sales and use tax. 5/28/93.

505.0340 **Smithsonian Institution.** A sale of property to the Smithsonian Institution, an agency of the United States, is exempt from the sales tax. 8/29/57.

505.0345 **Southern California District Export Council.** Although this council is composed of individuals appointed by the U.S. Secretary of Commerce, it is

SALES TO THE UNITED STATES, ETC. (Contd.)

not an agency or instrumentality of the United States. Accordingly, neither its sales nor purchases are exempt from sales or use tax. 6/14/91

505.0350 **Trustee in Bankruptcy as Federal Instrumentality.** As a result of an administrative order of the referee in bankruptcy of the United States District Court for the Central District of California, all administrative cases filed under Chapter XIII in Integral Commercial Area No. 1 will be performed by the Office of the Trustee, the title of that office shall be Chapter XIII Trustee, and all trust bank accounts, goods, services, and taxes will be in the title of that office with the appointed Trustee as the authorized signatory. As a consequence, purchases of tangible personal property by that Office of the Trustee for use in the specified administration of Chapter XIII of the Bankruptcy Act, purchased with trust funds administered by that office, are purchases by an unincorporated instrumentality of the United States, the Office of the Chapter XIII Trustee in that area, and are exempt from sales and use taxes. 7/12/76.

505.0356 **Uniforms Paid from Employees' Uniform Allowances.** Employees of the United States Post Office Department are authorized uniform allowances by the Department. When employees need to acquire or supplement their uniforms, the employees order the necessary items from a vendor. Upon receipt of the items ordered, the employees present the accompanying invoice to the Department's disbursement officer. The disbursement officer then deducts the amount of the invoice from the employees' allowances and pays the invoice amount to the vendor by means of a Department check. Since payment is made by the Department, sales of uniforms to post office employees in which the Department makes payment to the vendors are sales to the United States and sales tax does not apply to such sales. 9/21/70.

505.0360 **Unincorporated Agencies or Instrumentalities.** Sales of tangible personal property to the following committees and boards are exempt sales to unincorporated agencies or instrumentalities of the United States under Section 6381(a):

Almond Board of California
California Date Administrative Committee
California Desert Grape Administrative Committee
California Olive Committee
Cotton Board
Kiwi Fruit Administrative Committee
Lemon Administrative Committee
Mushroom Council
Navel Orange Administrative Committee
Nectarine Administrative Committee
Oregon-California Potato Committee
Prune Marketing Committee
Raisin Administrative Committee
Tokay Industry Committee
Valencia Orange Administrative Committee
Walnut Marketing Board

SALES TO THE UNITED STATES, ETC. (Contd.)

The following four agencies are commonly known as the ''California Tree Fruit Agreement Control Committee:''
Pear Commodity Committee,
Peach Commodity Committee,
Plum Commodity Committee,
Winter Pear Control Committee. 4/25/89; 12/4/90; 3/8/91; 5/17/94. (Am. 2000–1).

505.0362 **United States Holocaust Memorial Council.** The United States Holocaust Memorial Council is a federal instrumentality and sales to this Council are exempt from tax. 12/5/89.

505.0362.120 **United States Information Agency (USIA).** USIA is an agency of the United States Government. Therefore, tax does not apply where staff members, acting in their official government capacity, purchase goods by issuing a U.S. Government purchase order, where the goods are paid for by credit card issued to the United States, or where payment is made by U.S. treasury check or wire transfer of funds. On the other hand, tax does apply to sales and leases to U.S. Government employees, including employees acting in their official capacity, if payment is made directly by the employee by cash, check, or personal credit card notwithstanding the fact that the U.S. Government may reimburse the employees for expenses. 6/24/96.

505.0363 **U.S. Marshal.** A restaurant was seized by the U.S. Marshal who contracted with a property management company to operate the restaurant business on behalf of the United States. There is no indication in the contract that anyone other than the United States is the owner of the restaurant. The United States must be regarded as the owner of the restaurant making the sales. The sales made by the restaurant are exempt as sales by the United States. 10/16/90.

505.0365 **U.S. Treasury Checks.** Under federal statutes, the funds for necessary services and facilities for operating the offices of former presidents of the United States are appropriated by Congress and provided by the General Services Administration. Payment for such facilities and services is made by U.S. Treasury checks. Under these circumstances, the purchaser is the United States Government, and the sales are exempt from sales and use tax. 3/30/90.

505.0370 **Western Farm Credit Bank.** Western Farm Credit Bank is a federally chartered instrumentality of the United States pursuant to Section 1.3 of the Agriculture Credit Act of 1987. Thus, it is exempt from state sales and use taxes. 3/26/91.

(b) AGENCIES NOT QUALIFYING FOR EXEMPTION

505.0377 **Alameda Officers' Wives Club (AOWC).** The Alameda Officers' Wives Club was not established nor does it operate under the authority of the federal statutes or regulations. Therefore, it is not an agency or instrumentality of the United States. AOWC owes sales tax on its gift shop's retail sales. 7/11/95.

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505.0380 **American Legion Posts.** Sales of personal property to American Legion Posts operating in Federal areas are subject to sales tax. Such Posts are not Federal instrumentalities. 9/20/54.

505.0413 **California Army National Guard.** Pursuant to a licensing agreement, the California National Guard operates three clubs at an Armed Forces Reserves Center. The licensing agreement is for an indefinite term but revocable at will by the Secretary of Army. Among the licensing provisions is one which requires performance in accordance with Department of Defense regulations subject to the provisions of adequate funding to the licensee. Absent such funding, each component occupying the facilities must pay its pro-rata share of costs. The licensing agreement also allows for short term licenses to community service activities provided such use is not at the expense of the Federal Government.

The operation of the club system is a ''community service activity'' and therefore is run at no expense to the Federal Government. Since federal funds are not used the clubs cannot be considered instrumentalities of the United States. Accordingly, tax applies to any sales and purchases made by the club. 4/29/80.

505.0420 **Community Action Organizations.** Community action organizations under Title II of the Economic Opportunity Act of 1964 (PL 88-452) are not agencies or instrumentalities of the United States. However, purchases made by such organizations through the United States General Services Administration are sales to the United States and not subject to the sales tax. 6/28/65.

505.0440 **District Agricultural Association.** A District Agricultural Association is an agency of the State of California, is not an instrumentality of the United States, and sales to such agencies are subject to sales tax. 8/7/52.

505.0480 **Irrigation Districts,** organized in connection with federal reclamation projects, are not federal instrumentalities, sales to which would be exempt. 12/8/50.

505.0518 **Legal Services Corporation.** Section 1005(e)(1) of the Legal Services Corporation Act specifically states that the Corporation shall not be considered a department, agency, or instrumentality of the federal government. Sales to the Corporation in California are therefore subject to tax. 7/28/76.

505.0520 **Legal Services Foundation.** The Contra Costa Legal Services Foundation, a community action organization organized pursuant to Title II of the Economic Opportunity Act of 1964, is not classified as an instrumentality of the United States Government. Accordingly, sales thereto are not exempt from sales tax. 1/4/68.

505.0530 **Members of the House of Representatives.** A printer printed mailers and flyers which invited the public to attend a community meeting to discuss various issues for a member of the U.S. House of Representatives. The printer delivered this property to the congressman's staff in this state for distribution in this state. The mailers were intended to be mailed free of postage under the congressman's franking privileges.

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The printer's billing invoices were addressed to the congressman personally and not to the government. The fact that the congressman may have used this property in performing his official duties does not necessarily mean that the sale was to the United States. The printer did not obtain a government purchase order or remittance advice as required by the regulation. Tax is due on this transaction. 5/23/89.

505.0540 **National Guard.** Until such time as the National Guard is called to federal duty, it operates pursuant to state authority and sales to members thereof and to members of R.O.T.C. units are subject to sales tax. 6/22/54.

505.0560 **National Guard Unit Funds.** Purchases by National Guard Unit Funds are not exempt from sales tax as sales to instrumentalities of the United States Government. 9/16/63.

505.0580 **Navy Relief Societies.** Sales made to Navy Relief Societies are not sales to an agency or instrumentality of the United States and consequently not exempt. 7/28/53.

505.0590 **Pilot Training.** Leases of aircraft to pilot training schools which train students under federal programs are not exempt. Aircraft are mobile transportation equipment, leases of which are uses by the lessor. Thus, tax applies to the lessor's use of the aircraft whether the payments by the U.S. Government are made to the students or directly to the school. 2/8/79.

505.0600 **Raisin Advisory Board.** Sales of personal property to the Raisin Advisory Board are subject to sales tax. It is a state board created pursuant to Food and Agricultural Code Section 58841, not created pursuant to federal regulation. 12/4/90.

505.0602 **Regional Rail Commission.** A Regional Rail Commission which is a Joint Powers Agency organized pursuant to section 6500 et. seq. of the California Government Code has a primary purpose of instituting a commuter rail service between two California points. The question posed was whether a use tax imposed on the Commission's use of the vehicles would be a discriminatory tax in violation of the 4R Act as applied in the case of *National Railroad Passenger Corporation* v. *State Board of Equalization (*N.D. Cal. 1986) 652 F.Supp. 923.

The *National Railroad* case does not apply to this situation. In *National Railroad,* the consumer of the passenger rail vehicles was Amtrak, an entity created by the United States Government, and Amtrak was using the subject vehicles on actual interstate lines in actual interstate commerce. The Commission will be using the vehicles in intrastate commerce on a intrastate line. Therefore, the only exemption possibly applicable to the Commission's purchase and use of the vehicles is section 6368.5. That exemption, however, is limited to the use of rail freight cars in interstate and foreign commerce and, thus, is not applicable. 12/16/96.

505.0605 **Sale to Law Firm—Not U.S. Government.** A company sold microfilm to a law firm handling a case for the FSLIC. The law firm believes that it is exempt from paying sales tax since they are working for a branch of the federal government.

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The law firm is mistaken in the belief that the sales to them are exempt merely because they work for the FSLIC. Since the microfilm was sold to the law firm and not to the federal government, the exemption for sales to the federal government does not apply. Rather the microfilm sales were taxable sales to the law firm for the law firm's use in its performance of its contract with the FSLIC. The company's sales of the microfilm are subject to sales tax. 2/17/88.

505.0608 **Sales to the U.S. Government.** Sales to a U.S. government contractor, that would otherwise be taxable, do not qualify for exemption on the strength of an amendment made to the contract with the U.S. providing that the contractor acted as an agent of the U.S. for certain purposes, including the disbursement of government funds for the acquisition of property. In ruling on this situation, the U.S. Supreme Court concluded that if the contractors can realistically be considered entities independent of the United States, a tax on them cannot be viewed as a tax on the United States. Also, there is some doubt whether a person not an instrumentality of the United States can act as an agent of the United States (see *United States* v. *New Mexico* (1982) 455 U.S. 720, 71 L.Ed.2d 580). 4/1/94.

(c) STATE OR LOCAL AGENCIES RECEIVING FEDERAL FUNDS

505.0620 **Economic Opportunity Council.** Sales to a local Economic Opportunity Council, not itself an agency or instrumentality of the United States, are not exempt as sales to the United States even though federal funds are used in whole or in part to pay for the goods purchased. 12/29/66.

505.0640 **Generally.** Where a United States Department merely furnishes funds with which a vendee makes a purchase the sale is not to the United States. 3/18/52.

505.0660 **Generally.** State or local government agency, merely in using funds supplied by Federal Government to make purchases does not become entitled to benefit of exemption of sale to United States. 7/18/51.

505.0680 **Generally.** In accordance with opinions of the State Attorney General, and the Comptroller General of the United States, tax is applicable notwithstanding that the state agency making the purchase used federal funds allotted to it for that purpose. 7/28/52.

505.0700 **Housing Authority of Long Beach City.** Tax applies to sales of tangible personal property to the Housing Authority of the City of Long Beach. The Housing Authority is not an agency or instrumentality of the United States Government. It is immaterial that the Authority is financed entirely by federal funds. 10/14/69.

505.0720 **National Guard.** Funds obtained by California National Guard Units as their share of so-called PX dividends from the United States, become funds of the state and purchases made out of such funds are subject to sales tax, even though the source of the funds was the United States and subject to regulation by the latter. 3/4/55.

SALES TO THE UNITED STATES, ETC. (Contd.)

505.0730 **Puerto Rico.** Puerto Rico is an agency or instrumentality of the United States Government. Sales to the Economic Development Administration (EDA) of Puerto Rico are, therefore, within the exemption provided by Section 6381 and are not subject to sales tax. 10/7/80.

505.0740 **R.O.T.C. Uniforms.** The sales tax applies to R.O.T.C. uniforms purchased by a university and for which the university is reimbursed by the Government under a contract contemplating that the university is to purchase the uniforms in its own name and on its own credit, the university not having the power to act as agent of the government or to pledge the government's credit. 2/26/58.

505.0746 **Railroad Track Components.** A taxpayer enters into a contract to furnish railroad track components such as switches, frogs, point protectors, switch stands, guard rails, derails, and insulated joints to a California regional rail authority. Tax applies to sales to governmental entities other than the U.S. and its agencies. While 49 U.S.C. section 11503(b) operates to exempt sales of rolling stock from tax, it does not apply to track components. Further, a tax imposed on retail sales of track components does not discriminate against a rail carrier. 5/23/95.

505.0750. **San Francisco Peer Review.** Although the San Francisco Peer Review organization received federal funds to review Medicare and Medicaid services, it has no sales or use tax exempt status of its own. Therefore, sales tax applies to retail sales of equipment to the San Francisco Peer Review. 11/4/76.

505.0754 **State Agency.** A communication system for linking transportation vans to aged and disabled persons who are served by the vans is funded through the federal government. Funding is provided to the state which then disburses funds to persons who sell equipment. Since payment for the equipment is not made directly by the federal government, the sales are not exempt as sales to the federal government. 2/23/95.

(d) VETERANS' ADMINISTRATION PROGRAMS

505.0760 **Autos, Sale of, to Amputee Veterans.** Pursuant to Public Law 187, 82nd Congress, Chapter 532, First Session, Senate Bill 1864, the veteran first applies to the Veterans' Administration for an eligibility certificate to make the purchase, negotiates a sale with the dealer of his choice and takes delivery of the car. However, a copy of the sales invoice is sent to the Veterans' Administration, and the dealer sends a bill for $1,600.00 to the Veterans' Administration, and the Veterans' Administration pays the $1,600.00 directly to the dealer.

Such a transaction is a sale to the United States to the extent of the amount paid by the United States where that amount is billed directly to the United States by the dealer and where the United States makes payment directly to the dealer.

As further support of the contention that the sale is partially a sale to the Veterans' Administration the invoice should show the Veterans' Administration as the actual purchaser to the extent that payment is to be made by the Veterans' Administration. 12/5/51.

SALES TO THE UNITED STATES, ETC. (Contd.)

505.0780 **Drugs and Supplies.** Where the Veterans' Administration has entered into a contract with the California Pharmaceutical Association whereby the Association handles billing by member pharmacies for drugs and supplies furnished to authorized veterans, and the Veterans' Administration provides the funds which are ultimately paid over by the Association to the pharmacies, sales to veterans under this program are considered as sales to the United States and as such are exempt. 5/6/60.

505.0800 **Drugs and Supplies.** Where the supplies are in fact purchased and paid for by the Veterans' Administration, the sale thereof is exempt from sales tax as a sale to the United States. The seller should retain copies of purchase orders, invoices, and other pertinent documents in order to sustain the exempt character of the transactions.

There must be an actual sale to the Veterans' Administration for sales tax exemption. Thus, if supplies are furnished to the student-veteran and the Veterans' Administration merely reimburses the student or school for the cost of such supplies, the transaction is not exempt. 2/20/51.

505.0810 **Veterans' Administration Volunteer Service Advisory Committee** is an instrumentality of the United States. Accordingly, its retailing activities and purchases are exempt from sales and use taxes. 9/24/90

505.0814 **Veterans Service Organizations.** There is no federal or state law creating an exemption from state or local sales or use tax for the sale of food or drink prepared by veterans' service organizations chartered by Congress for consumption on the premises of such organizations. 12/13/84.

(e) MEDICARE PROGRAM

505.0820 **Medical Supplies Furnished Under Medicare.** Medical supplies which are not ''medicines'' under Section 6369, furnished to patients under the Medicare Act pursuant to contracts between the hospital and the United States Government, with the government making direct payment in whole or in part to the hospital for the supplies, are exempt sales to the United States Government to the extent payment is made by the government. If the supplies are furnished to the patient under the Medicare Act pursuant to contracts between the patients and the hospital, with direct payments made by the patients, the sales are taxable to the patients even though the patient mayreceive reimbursement from the California Medicare Assistance Program. The sale of such supplies to patients under California Medicare Assistance Program is subject to sales tax regardless of whether payment is made by the patient, county, or state. 8/22/66. (See annotation 300.0030.)

505.0840 **Medicare Claims.** The sale of an item to a person insured pursuant to Part B of the Medicare Act, where the claim of the person for reimbursement is assigned to the supplier and the supplier files the claim with a carrier (administrator of Medicare claims under contract with the United States), is not exempt as a sale to the United States. This is in accord with the stated position of

SALES TO THE UNITED STATES, ETC. (Contd.)

the United States Department of Health, Education and Welfare, which is charged with administering the Medicare Act. 10/25/78.

505.0850 **Federal Contractors.** Corporation A makes sales of tangible personal property to Corporation B. The property is shipped from within California to Corporation B in California. Corporation B has a contract with a federal agency to perform unspecified tasks on an island in the Pacific Ocean. Corporation B ships the property to the island. Corporation B claims that no tax is due on the transactions but specifically states that the property is not purchased for resale to the U.S. government. The sales are therefore at retail and subject to tax.

The sales are not exempt sales in interstate commerce because the property is delivered to the buyer in this state. The sales are not exempt sales to the U.S. government because federal contractors are not regarded as agents of the U.S. government (see *United States* v. *New Mexico* (1972) 455 U.S. 720). 7/25/94.

505.0860 **Medicare Contractor.** Purchases of tangible personal property by a life insurance company, serving as a Medicare contractor, for use in administering the Medicare program are not exempt under Section 6381. Some states establish that a life insurance company which serves as a Medicare contractor is an instrumentality of the United States when administering the Medicare program for purposes of that state. However, unlike other states, California does not have a statutory provision which expands the definition of ''instrumentality of the United States'' beyond the definition given to that term by the United States. 4/9/91.

505.2250 **Sale of Orthotics and Prosthetic Devices.** Taxpayer is in the business of providing orthotic and prosthetic devices which are custom fit by the taxpayer's licensed professionals to meet the needs of each individual patient. All sales are made under prescription from the patients' physician. The direct material costs equal or slightly exceed direct labor costs, but the charges are commingled for acceptance by Medicare/Medicaid and private insurance carriers. That the taxpayer's customer may be reimbursed by a medical insurer is not relevant to the determination of whether taxpayer is making an exempt sale. If the sale does qualify for exemption, the taxpayer should obtain from the purchaser an exemption certificate conforming to the requirements of Regulation 1667 and retain it in its own records to support the exemption. If the sale is to Medicare A, it is a sale directly to the United States and is exempt from tax. However, if the patient is reimbursed under Medicare B, that is a sale to the patient, the normal taxation rules apply to determine if the sale was subject to tax. When the sale is not exempt, the taxpayer's entire charge is subject to tax. Whether separately stated or not, the taxpayer may not deduct its charges for fitting because the fitting devices are part of the taxable sale of taxpayer's tangible personal property. 4/19/96.

SALESMEN

See Automobile Dealers and Salesmen.

SAMPLES
See Demonstration, Display and Use of Property Held for Resale—General; Gifts, Marketing Aids, Premiums and Prizes.

SECURITY FOR TAX
See Collection of Tax by Board

510.0000 SEEDS, PLANTS AND FERTILIZERS—Regulation 1588

(a) SEEDS AND PLANTS

510.0010 **Alfalfa, Flax and Cress Seeds.** Alfalfa seeds used to make sprouts, flax seeds and cress seeds all qualify as " . . . seeds . . . the products of which ordinarily constitute food for human consumption . . . " and are exempt from sales tax, unless labeled as a food supplement or equivalent. 3/14/90.

510.0013 **Amplify D.** Amplify D is a chemical substance (adenosine monophosphate) which is applied to either the soil or the seed and is intended to improve the germination, growth, or other desirable characteristics of plants (emergence and seedling vigor). Accordingly, Amplify D is an auxiliary plant substance as defined in Food Agricultural Code section 14513 and, therefore, does not qualify for tax exempt treatment under Regulation 1588. 10/11/89.

510.0020 **Bulbs,** plowed under or otherwise destroyed at the termination of one growing season, are regarded as annual plants, and the sale thereof is exempt if the products are to be sold in the regular course of business. 9/19/52.

510.0077 **Fig Pollen.** Capri fig pollen which is sold for use in pollination of the Calimyrna fig is exempt from tax even though the Capri fig is inedible. The pollen is regarded as an annual plant which is used in the production of Calimyrna figs for human consumption. 11/8/94.

510.0089 **Seedlings.** Sales of eucalyptus seedlings to persons who will grow them expressly for fuel purposes are exempt from sales tax under section 6358.1 provided an exemption certificate under Regulation 1667 is taken by the seller in

SEEDS, PLANTS, ETC. (Contd.)

good faith and timely. The exemption would not apply if a purchaser buys seedlings, plants them in a manner so as to control soil erosion, then harvest the trees for fuel. 3/8/84.

510.0120 **Nursery Stock.** Seeds, annual plants, and fertilizer to produce and grow nursery stock for resale are not taxable, nor are nonreturnable containers in which stock is placed and both sold. 6/19/50. (Am. 2002–2).

510.0160 **Ornamental Plants.** The sale of ornamental plants, unless sold for resale, is subject to sales tax. 7/11/63.

510.0175 **Palm Trees.** Since dates ordinarily constitute food for human consumption, on or after January 1, 1999 sales of palm trees that produce edible dates are exempt from tax even if sold for landscaping purposes under section 6358. The exemption does not apply to sales of the fruitless variety or to palm trees that produce inedible dates or dates not generally eaten. 6/11/99. (2000–1).

510.0190 **Seed Purchases and Growing Agreement.** Separately stated charges for growing services required to transform avocado seeds into planting seedlings are subject to the tax where the true object of the purchaser's order was to obtain the seedlings ready for planting. 3/1/78.

510.0220 **Seeds and Seedlings of Timber Trees.** Sales of seeds and seedlings to a purchaser, solely for the purpose of producing timber trees to be harvested and sold are exempt as sales for resale. The sale of the seeds is also exempt under Section 6358(c). If the trees are, in fact, purchased also for an additional specific purpose, i.e., seed production or prevention of soil erosion, the tax would be applicable. Mere incidental beneficial effects of the trees will not, however, result in the tax becoming applicable. 4/1/66.

510.0260 **Sudan Grass Seed.** Sudan grass seed when used to produce pasture grass for grazing is exempt as a sale of seed the products of which will be used as feed for any form of animal life the products of which are to be sold in the regular course of business. 2/26/53.

510.0280 **Treating of Flax Seed.** Charges for the coating of flax seed are exempt if the sale of the treated seed would be exempt. The sale of the seed is exempt if sold to a farmer and accordingly, the coating charge is exempt. 12/16/55.

510.0300 **Treatment of Exempt Seed.** Charges for treating exempt seed, such as beans, are not taxable. If the chemicals used in treatment become incorporated into the seed, the chemicals may be purchased for resale. It is immaterial whether the seed is furnished by the customer, or is sold to him by the person applying the chemicals to the seed. 1/7/52.

510.0320 **Use of Seed Products for Research Purposes.** Section 6358 of the Sales and Use Tax Law which exempts the sale of seed ''the products of which ordinarily constitute food for human consumption,'' exempts the sale of vegetable seed even though the products may be used for research purposes. 8/30/66.

SEEDS, PLANTS, ETC. (Contd.)

510.0360 **Use Prior to Sale.** Peat moss, sand, gravel, crushed rock, shavings, sticks, stakes, trellises, and plant ties, placed in the pots or cans with plants and ultimately sold along with the plant in the same pot or can, are exempt from tax.

However, the purchase price of any of these items which are used prior to being placed in such pots or cans, is not excludable from the measure of the tax. 4/13/53.

(b) FERTILIZERS

510.0440 **Agricultural Minerals.** Soft Phosphate with Colloidal Clay, Glauconitic Marl, Marland, Hoover's Mix, and Hybro-Tite are agricultural minerals and exempt from tax as fertilizers. 2/8/54.

510.0470 **All-Purpose Spray Adjuvant and Spray Adjuvant Defoamer.** ''All-Purpose Spray Adjuvant'' and ''Spray Adjuvant Defoamer'' are subject to sales tax because they cannot be classified as fertilizers within either the code or regulation meaning. These products do not contain nutrients. 5/3/77.

510.0475 **Aqua-Ponic Garden System.** The Aqua-Ponic Garden System is described as self contained and that it will feed and water itself. The basic system incorporates a solution of pre-mixed nutrients and water that is fed to plants growing in a sterile growing media (not soil). The gravel medium in which vegetables grow is described as any pea size or large lava rock, center or lightweight aggregate.

For the sale of the nutrient to be exempt from sales and use tax, it must be ''applied to land'', Regulation 1588 (b). The balanced Use Tax Law does not define ''land'', but ''land'' is defined in the Civil Code as ''. . . the material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance . . .''. This definition is broad enough to include the gravel medium in which the vegetables grow, and into which the nutrient is inserted. The nutrient solution is ''applied to land the products of which are to be used as food for human consumption,'' and if it contains the chemical composition necessary to meet the statutory requirements qualifying it as a '' fertilizer, '' sales of the nutrient are exempt from sales and use tax. 12/13/90.

510.0480 **"Bean Straw"** being a ''soil amendment,'' like peat moss, having no more plant food value than peat moss, is not an exempt fertilizer when strewn on land and plowed under citrus orchards. 1/7/52.

SEEDS, PLANTS, ETC. (Contd.)

510.0540 **B-Nine (N-Dimethylaminosuccinamic Acid).** B-Nine is used by growers to retard the growth of stems of certain flowering plants. It acts on plants by affecting their cellular structure and not by virtue of furnishing nutrients. Accordingly, B-Nine is not regarded as a fertilizer. 6/23/65.

510.0560 **Bulk Organic Mulch.** Tax does not apply to sales of bulk organic mulch composed of recycled or composted grass, leaves, and brush for use in an almond orchard if the seller supplies a nutrient analysis to the purchaser which conforms to Food and Agricultural Code Section 14512 such that the product would be considered an agricultural mineral by the Department of Food and Agriculture. The seller is required to obtain a Fertilizing Materials License before marketing the product in California. Under such circumstances, the mulch would be considered to be an agricultural mineral and, therefore, fall within the definition of fertilizer under sales and use tax Regulation 1588(b)(1). 3/27/97.

510.0580 **Carbon Dioxide.** Carbon dioxide sold at retail to farmers for application to their land to assist in the neutralization of alkaline soils, qualifies as a ‘‘fertilizer.’’ 5/6/60.

510.0592 **Complete Green.** Complete Green is a synthetic polyelectrolyte, a special kind of polymer which is used in agriculture to improve the quality of topsoil. Synthetic polyelectrolyte is classified under section 14513(a) of the Food and Agriculture Code as auxiliary soil and plant substance. Section 14513 further provides, however, that substances which are commercial fertilizers, agriculture minerals, economic poisons, soil amendments, or manure ‘‘are excluded from the term auxiliary soil and plant substance.’’ Thus, a substance which is classified as an ‘‘auxiliary soil and plant substance’’ under section 14513 does not qualify under the Food and Agriculture Code as a ‘‘commercial fertilizer,’’ an ‘‘agriculture mineral,’’ or a ‘‘manure.’’

Since synthetic polyelectrolytes are specifically excluded from the definition of fertilizers, agricultural minerals, and manure under the Food and Agriculture Code, synthetic polyelectrolytes are not considered to be fertilizers under Regulation 1588. Therefore, Complete Green, a synthetic polyelectrolyte, is not a fertilizer and tax applies to the sales or use of this product. 1/30/84.

510.0596 **Cottonseed Meal Used in Growing Mushrooms.** Since there is no commercial fertilizer manufactured for growing mushrooms, mushroom growers formulate a compost with various ingredients, including cottonseed meals which contain close to 5% nitrogen to fertilize the mushroom spawn with essential ingredients necessary to produce commercial mushrooms. The growers purchase the ingredients separately and mix them together to make the compost.

Mushrooms are products which are used as food for human consumption. The only issue is whether the cottonseed meal is within the definition of ‘‘fertilizer.’’ A ‘‘commercial fertilizer’’ is defined in section 14522 of the Food and Agricultural Code as including any substance which contains 5% or more of nitrogen. Based upon representation that the cottonseed meal contains close to

SEEDS, PLANTS, ETC. (Contd.)

SEEDS, PLANTS, ETC. (Contd.)

5% nitrogen and that it contains essential ingredients necessary to produce commercial mushrooms, the cottonseed meal is an agricultural mineral exempt from tax. 8/7/92.

510.0600 **Cover Crop Seed.** Sales of cover crop seed are not subject to tax where the cover crop is plowed under for use as fertilizer, provided the cover crop is planted on land which, after the cover crop is plowed under, will be used in the production of food products for human consumption or for the production of crops for sale. 3/29/50.

510.0660 **Earthworms,** sales for use in improving soil are subject to tax. 1/25/50.

510.0700 **Fill Dirt.** Sales of fill dirt to dairies and farmers are subject to tax. Such product is not an exempt fertilizer. 10/15/53.

510.0710 **First Prize Products.** "First Prize Plant Food" and "First Prize Planter Mix" are not exempt from California sales tax as commercial fertilizers. 5/3/77.

510.0720 **Foliar Applications.** Exemption of sales of fertilizer will not be denied upon the basis that the fertilizer is applied by spreading on the foliage of the plants.

Ultimate utilization of the fertilizer by the plant irrespective of the method of application, wherein the material actually reaches the soil and is absorbed by the plant through the roots, governs our conclusion. Any other construction of the exemption statute would seem to be unreasonable. 7/17/53.

510.0820 **"Greenz 26."** "Greenz 26" is an agricultural mineral and, if applied to land, the products of which are to be used as food for human consumption, or sold in the regular course of business, is exempt from sales tax. 10/4/56.

510.0860 **Gypsum, Soil Sulphur, Super Phosphate and Sulfuric Acid.** The products are classified as commercial fertilizers or agricultural minerals. The sale of the products is exempt from tax when they are sold as fertilizers for application to land the products of which are to be used as food for human consumption or sold in the regular course of business. 1/3/50. (Am. 99–2).

510.0880 **Hay and Straw** applied to land is not "fertilizer" and tax applies to gross receipts. 1/30/50.

510.0887 **Hay and Straw Sold to Commercial Mushroom Producers.** Hay and straw may be purchased for resale when purchased for use as a component for compost to provide essential nutrients for mushrooms which are grown for resale. 4/1/85.

510.0900 **Herbicide—Ordram 5 Granular,** a selective herbicide used by rice farmers to control watergrass, is not a plant nutrient. Accordingly, it does not qualify as a fertilizer under Section 6358 of the Revenue and Taxation Code. 3/4/66.

SEEDS, PLANTS, ETC. (Contd.)

510.0980 **Larvacide (Chlorpicrin).** Retail sales of Larvacide (Chlorpicrin) are not exempt as chlorpicrin is not a fertilizer or plant nutrient. 5/26/53.

510.1000 **Legume Inoculants** are not fertilizers, and sale thereof to persons who will coat seeds with inoculant and plant seeds is not exempt. 7/30/59.

510.1020 **Liquid Fertilizer.** A person who sells liquid fertilizer is subject to sales tax on his purchase of nitrogen gas which is primarily used to pressurize the liquid fertilizer and force it into the irrigation system and is only secondarily used as a fertilizing agent. 8/28/69.

510.1080 **Manure as a Fertilizer.** A product which consists of animal or poultry manure to the extent of approximately 50 percent to 60 percent is properly classified as a manure and is, therefore, considered a fertilizer. 11/4/53.

510.1100 **"Marland" and "Colloidal Phosphate"** are both considered fertilizers under Regulation 1588 and are exempt from tax. 4/30/53.

510.1105 **Mushroom Growing.** Hay and straw may be purchased for resale when purchased for use as a compost to provide essential nutrients for mushrooms which are grown for resale. Peat moss may not be purchased for resale because it does not possess nutritional qualities for mushroom production. 9/11/75.

510.1108 **Mushroom Production.** A mushroom log, which is primarily a bag of saw dust which is impregnated with mushroom spores and incubated for 3–4 months to produce a living mushroom culture, is not a ''fertilizer'' and tax applies to its retail sale. Mushroom spores are not seeds and tax applies to their retail sale. 9/21/94.

510.1123 **N-Serve 24, N-Serve 24E and Energizer.** ''N-Serve 24'' and ''N-Serve 24E'' are pesticides, not fertilizers. ''Energizer'' is an auxiliary soil chemical, not a fertilizer. 4/11/78.

510.1135 **Nitrogen Zinc Foliar Spray.** Nitrogen Zinc Foliar Spray qualifies as an exempt fertilizer when sold to commercial farmers. 7/7/76.

510.1150 **Nutrient Buffer Spray.** Nutrient Buffer Spray qualifies as an exempt fertilizer when sold to commercial farmers. 7/7/76.

510.1200 **Peat Humus** is a soil amendment and not a fertilizer. 8/1/51.

510.1220 **Peat Moss** is classified as a soil amendment and is not a fertilizer. 5/9/50.

510.1310 **Protective Apple Bags.** In early Spring, an apple farmer encloses nascent apples in special bags to protect the fruit during growth, a period lasting approximately five months. These bags are removed fifteen days prior to harvest to allow the apples to color up for picking and packing. The bags are formulated to decompose in the soil around the apple tree thereby adding humus and small amounts of nitrogen to the root zone of the tree. However, the main benefit of

SEEDS, PLANTS, ETC. (Contd.)

using these bags is protection from sunburn, wind, rain, birds, and insects. The need for pesticides is also dramatically reduced because of the use of these bags.

These biodegradable bags do not qualify for the fertilizer exemption provided in section 6358 because the original use of the bags is not a fertilizer applied to the land. Rather, the bags are used to protect the fruit from sunburn, wind, rain, birds, and insects. Therefore, tax applies to the sale of the bags to the farmer. 7/11/96.

510.1340 **Root Zone Conditioners.** A taxpayer sells an item which consists of a rockwool. It is applied in ''slab'' form to make the soil substrate uniform, to improve water distribution, and to control EC and PH more efficiently. Root zone conditioners such as the item sold by the taxpayer are neither fertilizers nor agricultural chemicals and their sales are therefore not exempt. 5/4/94.

510.1355 **Rye Grain.** Rye grain does not meet the definition of either a ''commercial fertilizer'' or an ''agricultural mineral.'' The fact that it may be later used by the purchaser to produce a mixture which may meet the definition of an ''agricultural mineral'' does not affect the application of tax to the sale of the rye grain. 4/15/81.

510.1360 **Sewage Sludge.** Sewage sludge, containing 5 percent or more of nitrogen, available phosphorus pentoxide and potassium oxide in combination qualifies as a fertilizer under Section 1022 of the Agricultural Code and Section 6358 of the Revenue and Taxation Code. 1/21/66.

510.1400 **Soil Fumigants.** Carbon bisulfide and soil fumigants used in killing weeds, nematodes, insects or fungus, do not come within the fertilizer exemption and are subject to tax. 9/14/55.

510.1420 **Soil Fumigants.** Sales of, used to fumigate the soil and dust and spray materials used for insect control are not exempt from sales tax. 10/5/54.

510.1480 **Soil Aid.** Straw impregnated with horse excreta is ''manure'' regardless of the percentage of excreta included, unless the amount was so small as to be infinitesimal. 12/19/62.

510.1520 **Sulfuric Acid Used as Weed Killer or Agricultural Mineral.** When sulfuric acid is sold for the purpose of altering the pH of soil, it is classified by the Department of Agriculture as an agricultural mineral and if applied to land, the products of which are to be used as food for human consumption or sold in the regular course of business, it qualifies as an exempt fertilizer under Section 6358. If sulfuric acid is sold for use as a weed killer and is so used, it is not classified as an agricultural mineral and does not qualify as an exempt fertilizer under Section 6358. 1/5/57.

510.1540 **Top Soil, Leaf Mold** and Sand are not ''fertilizers.'' 7/2/51.

510.1560 **Urea.** Urea is an exempt fertilizer. 3/27/63.

SEEDS, PLANTS, ETC. (Contd.)

510.1580 **Use of Fertilizer—Application to Land.** Where original use of fertilizer by buyer is for other than application to land (for example, for use in litter) tax applies irrespective of fact that litter is later used as fertilizer. 10/11/51.

510.1590 **Vegetable Garden Fertilizers.** Best Bumper Crop 6-10-10 Tomato and Vegetable Food, Scott's Grow Fertilizer 18-24-6 Vegetables, and Ortho Tomato and Vegetable Food are specifically sold as fertilizer mixtures appropriate for application in vegetable gardening. No other use is suggested or recommended. Accordingly, retail sales of those fertilizers will be considered exempt sales of fertilizers to be applied to land the products of which are to be used as food for human consumption whether or not the purchaser has supplied the retailer with a certificate stating that those products are purchased for application to land the products of which are to be used as food for human consumption. 4/25/80.

510.1600 **Vetch and Grass Seeds.** Vetch seed, when planted as a cover crop and plowed under, is a fertilizer. 2/26/53.

510.1620 **Vetch Seed.** Vetch seed used in preparing "casing dirt" is exempt. 3/23/60.

510.1650 **Worms and Worm Castings.** Worms and Worm castings sold for use in organic gardening do not qualify for exemption as fertilizer to be applied to land. 7/7/77.

510.1660 **Waste Lime** held to be an "agricultural mineral." 1/24/51.

510.1700 **"XXX Alcufe"** is an economic poison and not an exempt fertilizer. 6/7/56.

510.1740 **"XXX Nutra-Spray 20-4"** is not an exempt fertilizer. 6/7/56.

510.1780 **Zinc Sulfate, Zinc Oxide, Manganese Sulphate, Magnesium Sulphate, Ferrous Sulfate and Copper Sulfate** sales of, exempt when sold to be supplied to land the products of which are to be used as food for human consumption. 7/8/52.

515.0000 SERVICE ENTERPRISES GENERALLY—Regulation 1501

See Advertising Agencies, Commercial Artists and Designers; Automatic Data Processing Services and Equipment; Construction Contractors; Gross Receipts; Leases of Tangible Personal Property—In General; Mailing Lists and Services; Miscellaneous Service Enterprises; Producing, Fabricating and Processing Property Furnished by Consumers—General Rules; Sale; and Tangible and Intangible Property.

(a) IN GENERAL—SERVICE DISTINGUISHED FROM SALE

515.0001.200 **Architectural Animations.** A taxpayer uses a computer to generate videotapes of proposed architectural projects. The computer model shows a pedestrian or passing automobile view of the project. After finishing the computer modeling, videotapes are delivered to the client. The work is not

regarded as the rendering of a service because the true object of the contract is the videotape. However, the videotape is regarded as a qualified motion picture and tax does not apply to the transfer of the original videotape. Tax does apply to copies of the videotape. 10/6/94.

515.0001.300 **Astrological Maps Produced By Computers.** An individual is planning to market a map of the world which is preprinted, but to which is added computer generated data which is different in each case. The forms that are entered into the computer are printed maps of the world. The computer is given the birth data of each individual client and it draws on the maps, by programmed mathematical formulae, the location of the planets at the time of birth, as they stood over certain parts of the world at that individuals birth moment. This information is presumed to have astrological value. It is not a birth chart the client receives, but a map of his or her birth chart projected mathematically upon the earth. Accompanying the maps, which are different in each case, and of which only one copy is made, is a key of symbols and interpretations, which is a printed pamphlet that describes how to use the map and what the lines on it mean. The booklet by itself would have no value, as it refers only to symbols that are on these maps and, thus, could not be sold apart from these maps.

The transactions are considered to be service transactions and not sale transactions even though certain tangible personal property is transferred to the client. 5/11/76.

515.0001.875 **Automated Drafting Services.** A company develops for its customer a complete symbology for piping and instrumentation diagrams for nuclear power plants. The resulting drawings are produced by a computer automated layout program. Furthermore, in the case of producing logic diagrams, the company inputs logic equations. The interrelationship of the elements and the use of its programs produce finished logic diagram drawings.

From the above description, the company is providing more than an automated drafting service. The customer is seeking actual engineering designs, computations, and specifications. The company exercises independent professional judgment in dictating the ideas and designs which are expressed in the drawings furnished to the customer. Therefore, the company is providing a nontaxable service in the case cited above and it is the consumer of the tangible personal property which it utilizes in rendering such services. To the extent that the company performs only automated drafting services, it is making sales of tangible personal property and item sales are subject to the tax. 4/16/75.

515.0001.900 **Automated Payment Processing Service.** A firm provides automated payment processing to its customers. That is, the firm collects payments on behalf of its customers for bank processing, transmits the amounts collected to the customer through electronic or telephonic transmission, and provides its customers with a periodic report reconciling the total deposits with amounts credited to specific patient accounts.

The true object of this transaction is to provide account collection and reconciliation services. Therefore, tax does not apply to the firm's charges for this

service. However, the firm is the consumer of the materials it uses in preparing its periodic reports and tax applies to the purchase of these materials where the firm purchases or consumes these materials inside this state. 2/26/97.

515.0002 **Automobile Insurance Reports.** Insurance rate quotes and other information given in a report depend upon the customer's responses to specific questions that they are asked. If this is the case, each report is a custom product and the charges for the first copy of the report will be for a nontaxable service. If extra copies of a report are provided and the customer is charged for these copies, sales tax must be reported and paid on the extra copies unless they are mailed to an out-of-state address pursuant to the contract of sale. 4/15/92.

515.0002.650 **Business Directories.** A taxpayer accumulates information about other businesses in certain geographic regions for compilation into computer disks and/or reference books. The taxpayer thereafter leases these disks and books to its customers.

Where the directory was specifically created, collected, or completed to meet a customer's particular order, the transaction is generally regarded as a nontaxable service transaction (Regulation 1501). In this type of situation, the transfer of a single copy of the compiled information on a computer disk or paper report is considered incidental to the providing of the service and tax only applies to the sale of such materials to the seller of the service. However, where a transaction involves the delivery of tangible personal property which includes information not customized to a customer's order (including a report previously prepared by the retailer on a custom basis), the transaction is a sale or lease of tangible personal property and is subject to tax unless an exemption otherwise applies. 8/1/95.

515.0002.690 **Business Strategy and Marketing Plan.** A taxpayer is hired to write ''the business and marketing plan'' for a client. The taxpayer interviews the client, has ongoing discussions with the client concerning the work, observes and listens to internal discussions of the client, and conducts field research. There is no transfer of possession or title to tangible personal property to the client except for one written copy of the plan and one written report consisting of the compilation and summary of the research.

The true object of this contract is for the client to obtain the customized information and advice which taxpayer develops for the client, not to obtain tangible personal property in the form of the printed reports. The client receives one copy of each of the two reports and no additional copies of the reports are transferred to the client. As such, the taxpayer's charges for this service are not subject to tax. 11/18/96.

515.0002.800 **Calibration Work.** When a contract merely calls for the delivery of calibration information, including the pertinent calibration charts, such charges are services and not subject to sales tax. On the other hand, if the contract calls for delivery of a template or a gauge stick, the total charge is subject to tax without any deduction for the labor in making the calculation required in connection therewith. 7/31/72; 7/10/96.

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515.0002.820 **Calligraphy.** Calligraphy is a work of art and the physical form of the calligraphy is the true object of the contract. Unless otherwise exempt (e.g., sale in interstate commerce), sales of calligraphy are subject to tax. 7/16/93.

515.0002.850 **Charges Made by Judicial Council for Information Packages.** Charges made by the Judicial Council, through the Department of General Services, to the Superior Courts of the individual counties for ''information packages'' are not subject to tax. Charges made by the individual Superior Courts to the private conservatorships for these packages are likewise nontaxable. Both transactions are regarded as government service transactions and not as sales notwithstanding the fact that transfer fees in the nature of cost reimbursements are paid in both instances.

Section 6006 defines the term ''sale'' as any transfer of tangible personal property for a consideration. Where property is furnished to members of the public by a governmental agency as required by law, there is no ''bargained for'' consideration and, therefore, there is no sale. However, sales tax does apply to the sale made by the printer to the Judicial Council for the printing of the information package. 07/8/92; 03/12/96. (Am. 2001–3).

515.0002.900 **Color Analysis Consultants.** Color consultants make a study of a client's most advantageous color, color combinations, etc., with respect to skin care, make-up, wardrobe, etc. At the conclusion of the analysis, a color book is presented to the client for reference when choosing clothing, make-up, etc. Although the consultant is providing a nontaxable service, there is also involved the transfer of tangible personal property of more than incidental value. The consultant is the retailer of the color book provided to the client and must make a reasonable allocation of the lump-sum price to establish a fair retail selling price as the measure of sales tax on the sale. 4/23/86.

515.0003 **Color Overhead Transparencies.** A firm prepares color overhead transparencies, based on hard copy outline notes, it receives from the customer. The true object of the contract is the transparencies produced and the total charge is subject to tax. 12/21/92.

515.0004 **Computer Generated Artwork.** A retailer of keyboarding or computer services generates computer artwork, such as company logo or illustration, which become the property of the customer.

Charges for computer generated artwork, graphics, designs or logos are subject to tax where the true object of the contract is the output and not the services rendered in providing the object. 11/2/92.

515.0004.100 **Computerized Lists of Menus.** The nature of a firm's business deals with providing patients with a computerized list of allergen-free diets. The firm compiles a database of various allergen-free diets. When an allergist refers a patient to the firm, the firm, for a fee, provides that patient with a computerized list of menus compatible with whatever specialized diet the physician has prescribed.

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In this situation, the firm is providing a service to the patient consisting of individually prepared computerized lists of menus. Accordingly, this is a service and not the transfer of tangible personal property on which the information is printed. Thus, the fee for this service is not subject to tax. 8/17/87.

515.0004.350 **Copies of Reports Furnished to Members.** Utility companies nationwide pay a lump-sum yearly fee to become members of an association. As members, the utility companies are given access to conferences, telephone support, and computer code access to the association's data base, published reports, and report updates.

The association contracts with various research contractors to perform scientific research pertinent to the electric power industry. At the conclusion of a research project, a written report is submitted by the contractor to the association. The association then contracts with a graphic designer and printer to produce a number of copies of the report in book form. Some of the books are delivered to the association directly and others are delivered to a distributor who is responsible for the distribution of the reports on order of the association. The distributor, under direction of the association, sends copies of the report to members. There is generally no limit on the number of reports sent to members.

At times, the distributor is requested to send additional copies to the association for internal use or distribution in a seminar. If nonmembers attend a seminar, there is a lump-sum charge.

Under these facts, the association is the consumer of copies of the reports which it furnishes at no additional charge to the members and to persons attending seminars. This is based on the fact that members receive significant services from the association which do not constitute taxable sales and a member may order any number of reports during the membership period. When the association conducts seminars and distributes copies of reports to participants for a lump-sum charge as part of the seminar, tax does not apply because the conduct of the seminar is a service transaction and the distribution of the reports is incidental to that transaction.

If the printer and the distributor are both located in California, the sales tax applies to the printer's sale of the reports to the association which the distributor will store on behalf of the association.

If the printer is located out of state and the distributor is located in state, the use tax applies on reports shipped by the printer to the distributor. If the distributor subsequently ships reports to members located outside California, the exemption from use tax provided by section 6009.1 would apply to those reports. The association would have made no use of the reports in California other than to store them for use solely outside the state. This exemption also applies to reports which the distributor ships out of state for the association's use at seminars out of state.

If both the printer and distributor are located out of state, neither sales nor use tax will apply to reports which are never delivered either to the association or its members in California. If the distributor sends a report to a member located in California, the association would be liable for the use tax on that report. 6/14/89.

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515.0004.450 **Creating Job Listing on World Wide Web (WWW).** Taxpayer's customers provide him with job announcements that he uses to create job listings on the WWW. These announcements and subsequent WWW listings are not provided to anyone in tangible form. Accordingly, tax does not apply to taxpayer's charges to its customers for creating a job listing web page since it is not selling or leasing any tangible personal property. 6/25/97.

515.0005 **Customer Printout of Mailing Labels.** A commercial mailer has received a mailing list from a customer that requires upgrading to zip+4 addressing.

Assuming the commercial mailer is only providing nontaxable mailing services to the customer the upgrading of the zip code to zip+4 is part of the service, and the charge is nontaxable. 11/2/92.

515.0005.075 **Customer Survey Program.** A taxpayer contracts with a client who manufactures and sells products to gather data regarding customers' satisfaction of the products the client sells. The client provides the taxpayer with a computer disk of the names and addresses of its customers. The taxpayer creates a customer letter and address label, prints a customer survey card and envelope, and imprints a pen with the client's logo to be enclosed in the survey mailing (in order to motivate responses). The printing and assembly is all done in California. The taxpayer mails the survey cards, pen, and personalized letter to the client's customers all over the country via the U.S. Mail. Upon receiving the responses to the survey, the taxpayer analyzes the data and provides a written report to the client summarizing this information.

Two invoices are sent to the client for this transaction. The first invoice is generated upon the mailing of the survey form, etc., and it includes charges for material and printing cost (plus a small mark up) and for out-going postage. The second invoice is generated when the taxpayer submits its written report to the client and includes the charges for the balance of the contract amount.

Sales tax does not apply to the gross receipts from the sale of pens and printed materials which, pursuant to the contract of sale, the taxpayer ships to persons outside this state by U.S. Mail provided neither the client nor its agent obtains possession of the property inside this state. Tax does apply, however, to the gross receipts the taxpayer receives from its sales to the client of printed material and pens that are shipped to the client's customers inside this state. Tax does not apply to the taxpayer's charges for postage for shipping the pens and printed material provided its charges for transportation are separately set forth in its contract of sale to the client and the amount deducted represents only the amount for shipment (and not ''handling'') of the property.

The transfer of the original unique report which is specifically collected, created, compiled, and customized for this specific client on a custom basis is incidental to the providing of a nontaxable service. The taxpayer is the consumer of any such property transferred. The taxpayer is the retailer, however, of any additional copies of the report transferred to the client. 4/10/96.

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515.0005.425 **Data Information Services—Internet.** A company provides weather data to its customers. The customers access the information by logging onto the company's service through the Internet. The company does not transfer any tangible personal property to its customers. No sales tax applies to its charges. 7/10/96.

515.0005.470 **Data Receiving Service.** A taxpayer provides each of its subscribers with data receiving equipment and also provides information to the subscribers by satellite transmissions which are received by the equipment. The receiver is not a computer and has no keyboard or data storage capabilities. The taxpayer retains ownership of the receiving equipment and the equipment is returned to the taxpayer upon cancellation of the subscription.

The taxpayer's basic package requires the subscriber to pay a one time start up fee and a monthly subscription fee. The subscriber can also obtain additional services (similar to the obtaining of a premium channel) on cable television. The billing method indicates that the equipment is being leased to the subscribers. The amount of the start up fee and the amount of the monthly fees depend upon the type of equipment furnished to the subscriber.

The subscribers receive two components: the data receiving equipment and the electronic satellite transmissions. The furnishing of the satellite transmissions does not involve the transfer of tangible personal property and the service of providing the transmissions are not regarded as services related to the sale of tangible personal property. The charge attributable to these services is not subject to tax. The billing method indicates that the equipment is being leased. The application of the tax to charges attributed to the lease is the same as the application of tax to leases generally. 10/16/91.

515.0005.510 **Database Transactions.** Transfers of CD ROMs, diskettes, and printed matter (whether printed by mass printing techniques, computer, word processing, or otherwise) containing information extracted from a previously existing database are generally taxable without regard to the fact that a particular listing of information from the database may have been prepared to the special order of the customer.

However, there are two circumstances that are recognized as research service cases. First, in cases where the information is of personal relevance to the inquiring party and not likely to be furnished in duplicate form to other persons. Examples of the types of transactions treated as service transactions are (1) individual profiles based on a person's time, date, and location of birth and no two profiles are identical, and (2) custom computerized reports prepared by matching raw scholarship data supplied by client to scholarship information contained on a database.

Second, the inquiry is so specific and limited that the customer is not looking to acquire some duplicate part of the taxpayer's database but is simply trying to obtain a status report with respect to the subject of interest. The true object of the contract here is research, not the furnishing of an extracted portion (bulk data) of a file maintained by the taxpayer which would enable the customer to do his own

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research. Looking up information in the database for the customer is considered research. In this case, the information would likely be transferred in report form, for a fee based upon the cost to the taxpayer of making the specific inquiry. When the taxpayer provides the customer the reference work and the customer ''looks it up'' himself, it is a sale of tangible personal property.

Thus, tax applies in all cases where there is a transfer of information drawn from pre-existing database, except as noted above. Tax applies whether the information transferred from the database is transferred in book, pamphlet, or brochure form, or in CD ROM or diskette form, or as prepared by computer, word processor, or other method. However, tax does not apply if the information is transferred electronically. 10/9/96. (Am. 99–2).

515.0005.700 **Debit Cards.** Telephone debit cards are issued in return for prepayment of telephone toll charges. They are indicia of value and transfers to subscribers are not sales of tangible personal property. Sales of blank cards to persons who issue them are taxable. 3/9/95.

515.0005.800 **Design.** An individual is hired by firms for ideas in determining how their products should look, feel, and sometimes function. A large part of the operation pertains to appearance and characteristics. The ideas are usually conveyed through sketches, renderings, or drawings. Sometimes a three dimensional study model is used to accurately and fully convey the true final color, finish, texture, feel, or tactile quality of the concept.

Based upon the description of this business, the individual is a commercial artist or designer, not a design consultant providing a service. Although services are almost always necessary in the creation and manufacture of items of tangible personal property which will be sold, the described contract is for the transfer of tangible personal property for consideration rather than a contract for services. 2/13/91.

515.0005.900 **Design of Case.** A firm contracted to design and engineer a case to hold collectibles. It charged $500 for ''concept configuration,'' $975 for ''component engineering,'' and $25 for blueprints. Concept configuration involved evaluating the problem, gathering data, and solving problems imposed by constraints such as size, appearance, cost, and manufacturability. ''Concept engineering'' involves selecting materials, discussions with toolmakers, calculations, and the production of blueprints to allow transmittal of design.

The contract is a service contract. Tax applies only to the charge for duplicate blueprints. 6/21/91.

515.0006 **Design and Set Rentals for Video Productions.** A company is engaged in the business of designing and building sets for video productions which are used mostly in television commercials and music videos. Detailed drawing, rendering, and overlays are prepared to illustrate the proposed appearance of the set, ideas for camera positions and lighting effects. The walls, platforms and other components of the set are usually prefabricated at the company's shop from materials purchased ex-tax under resale certificates. The

set components are then loaded on to the company's vehicles for transportation to the location of the shoot, unloaded and assembled together. The company then dresses the set by positioning props, cameras, and lighting. It also controls the art production crew and directs necessary changes in the positioning of cameras and props. When the shooting is completed, the set is disassembled with all usable materials being returned to the shop and the remaining materials discarded. Generally, the invoices simply bill a lump sum for ''cost of sets'', ''set construction'' or ''set construction: rental'' without listing the separate components. The company did not charge or report tax on the lump sum charges for set construction because it believed that it performed artistic design services and did not sell or lease tangible personal property.

Since the customers desire the property produced by the design services (the sets) and not the design services per se, the transactions are not services. Since the company transfers possession of the sets to its customers for a consideration, their transactions are leases. A lease is defined to include ''rental, hire and license,'' and, with certain exceptions not relevant here, leases are ''sales'' and ''purchases''. The design services are required to produce the property in the form desired by the customer and are, therefore, generally taxable as ''part of the sale'' of the property. In this case, the contracts show that the service of designing sets was offered to the customers together with the sets as a package. Therefore, the design services are ''part of the sale'' of the sets and are fully taxable, with the exception of installation labor. The remaining charges (i.e. transportation, disassembly labor, etc.), which were not separately stated, are also subject to tax. 4/23/91.

515.0006.500 **Detailed Drawings.** An individual, based upon architectural drawings supplied, prepares detailed drawings for use in shop fabrication.

Persons in the business of preparing blueprints and drawings are producing the end product desired. The gross receipts constitute a sale of tangible personal property subject to tax without any deduction for labor or service costs. Therefore, the entire receipts of the detailed drawing service are subject to tax. 7/11/68.

515.0007 **Documents Prepared From Model Forms.** A law firm has a database of model legal forms. It uses this database to create business documents, based on the specific fact situation of the transaction in question, which are ready to sign by the specific parties for whom they are designed. The law firm is providing a legal service, the charge for which is not taxable. This is true even though it provides this service to other attorneys whose clients are the parties involved in the transaction with respect to which the documents are designed. If, however, the law firm merely sold prewritten business documents, it would be making taxable sales of tangible personal property whether the purchasers were attorneys or non-attorneys. 7/25/88.

515.0008 **Educational Materials—Custom Made.** A taxpayer enters into contracts to develop custom-made training programs. The contracts require the taxpayer to design, develop, produce, and deliver certain educational items. The

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educational items consist of training manuals, overhead transparencies, workbooks, data disks, reproduction masters, booklets, and computer disks. The true object of the contracts is regarded as the tangible personal property delivered to the clients. Tax applies to the entire charge made by the taxpayer. 4/26/94.

515.0010 **Electrical Transmission of Printed Material.** A company which was in the business of transmitting printed material over telephone lines to reproduce an exact copy at a distant location was not subject to the sales tax on its charges to its customers. The ''true object'' of the transaction was to rapidly transmit printed material, which is a service rather than a sale of taxable personal property. 10/27/70.

515.0011.075 **Employment Reports.** A pre-employment personal screening service company provides a service consisting of creating combination reports on an individual as requested by a customer. The report may consist of a Drivers License report, a Consumer Credit Summary report, and a Worker's Compensation Claim report. The reports may also be faxed to the customer with an invoice. The service is provided only once per request.

All reports will be researched and prepared on a request by request basis and will contain information unique to a particular customer's request. In this case, the true object of the contract is for the service of researching and developing original information and the charges for such reports are not subject to tax. Charges for reports that are faxed are not taxable even if the reports are not part of a service because transfer of information by telephone lines is not considered a sale of tangible personal property. 3/26/92.

515.0011.135 **Equipment and Software Furnished with Database Access.** A firm enters into a contract with a customer to furnish information obtained from the Department of Motor Vehicle's (DMV) database. It furnishes the necessary hardware and software at the customer's location and also provides software updates and telephone support. Access to the database is through the firm's computers to ensure that DMV's security requirements are met.

The firm charges the client based on:

(1) one time start-up fee

(2) a ''per transaction fee''

(3) a ''per minute connect fee''

(4) a monthly support fee (training, equipment, support services)

(5) communication software

(6) a monthly equipment maintenance fee

The firm is a lessor of equipment, software, and updates. It is not the consumer of these items in connection with providing a service. The customer wants the ability to perform its own DMV inquiries. The firm fulfills this need by providing the necessary equipment and software. There is a temporary transfer of possession of property to, and use of the property by, another for consideration. This is a ''lease'' as defined in section 6006.3.

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Since the hardware was acquired tax paid and leased in substantially the same form as acquired, tax does not apply to charges related to the lease of the hardware. The software is not leased in substantially the same form as acquired and, thus, the charges related to the lease of the software are subject to tax. The charges for software updates transferred in tangible form also are subject to tax. The telephone support also is taxable unless optional and separately stated. 10/28/96.

515.0011.200 **Facsimiles.** A company is part of a national network which sends printed information over telephone lines through signals generated by a telecopier machine to reproduce an exact copy at a distant location. The operation is accomplished by establishing public locations which perform the sending and receiving operations. A customer brings his chart, photo, contract, or any other material to the nearest station. The charge made to the customer consists of a transmission fee plus the normal telephone charges involved in the transmission. The station operator places the material into the facsimile transmission unit and then places a call to the station nearest the desired destination. The customer's materials are then automatically transmitted. The receiving station operation removes the facsimile from the facsimile receiving unit and acknowledges that the message has been received. The receiving station then calls the local recipient who can either pick up the message or have it delivered by special messenger.

The service element outweighs the sales element in these transactions such that the ''true object'' of the transaction is the performance of a service and not the property produced by the service. What the customer desires is a rapid mailing or communication service. The company is the consumer and not the retailer of tangible personal property. Tax does not apply to the company's receipts from the operation of its photocopy transmission service. 10/27/70.

515.0011.220 **Failure Analysis Reports.** An independent contractor provides failure analysis reports to various companies regarding the design and operation of electronic circuitry and components. As part of the reports, the contractor provides photomicrographs to illustrate the failure analysis. In some reports, the contractor splits the failing component (provided by the client requesting the report) for analysis and provides a cross-section of the component, encasing the split component in plastic for ease of handling. The contractor charges an hourly rate for the failure analyses consulting work, and does not charge separately for the photomicrographs or the cross-sections.

Sales tax does not apply to charges for preparing and furnishing failure analyses reports. It is immaterial that photomicrographs and cross-sections may be furnished to the customer since no separate charge is made for these items and they are not the true object of the contract. If the contractor did not provide a failure analysis report but only prepared a cross-section from a component provided by the customer, the sales tax is applicable under section 6006(b). 9/28/76.

515.0011.260 **Focus Group Activities.** A taxpayer organizes focus group sessions for sponsors. The participants of the focus group contract with the

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sponsor. Participants are served food and beverages during the session and receive a videotape of the session to take home. The sponsor of the focus group provides significant educational services including classroom instruction. Participants are charged a lump-sum price. Under these conditions, tax does not apply to the sponsor's charge to participants. The videotape, food, and beverages are regarded as incidental to the educational services.

In addition to organizing the focus group sessions, the taxpayer contracts with the sponsor for (1) solicitation of participants for the sponsor and (2) providing the facility, food and beverages, and the videotapes to the sponsor.

The charges to the sponsor for the food, beverages, and videotape are subject to tax. The sponsor is engaged in creating a focus group and it is not reselling the food, beverages, and videotapes, but rather performing a service. The retail sale is by the taxpayer to the sponsor. However, based on the assumptions that the taxpayer is not responsible for service of the food (i.e., someone else is hired to do so) and there are significant educational services, the charge for the facilities is not subject to tax. Also, charges for solicitation of participants are not subject to tax if the solicitation is optional with the sponsor. 11/7/94.

515.0011.320 **Hand Held Receivers.** A taxpayer sells and rents a hand-held data processing device which receives radio transmissions of stock market, sports information, and other data. Customers may buy or lease the devices from the taxpayer. A monthly charge is made for access to the data base separate from any rentals paid for the lease of the device. Tax applies to the sale of the devices. Tax applies to the lease receipts unless the devices are purchased tax-paid by the taxpayer and leased in the form in which they were acquired. Tax does not apply to the service of supplying the data transmissions. 9/19/83.

(Note: The taxpayer has structured the transactions as a sale or lease of the device separate from the providing of the service and *MCI Airsignal* does not apply.)

515.0011.400 **Horoscopes.** A company is engaged in the business of providing horoscopes. A customer provides information concerning his date, time, and place of birth to the company who, in turn, delivers to the customer approximately twenty pages of information concerning the customer.

Persons in the business of providing horoscopes would be engaged in the performance of a service since (1) the customer's primary interest would be the contents of the horoscope and not the horoscope as a written object of property, (2) the horoscope would be prepared on an individual basis, and (3) the charge for horoscope would probably not vary with the number of pages provided the customer. If the horoscopes were sold as mere stock items, their sale might well be subject to tax. 10/28/69.

515.0011.490 **Individual Profiles.** A charge for preparing an individual's personality profile and forecast based on a person's time, date, and location of birth is not subject to tax. If individual profiles are prepared and furnished to the client and no two profiles are identical, the production of these individualized profiles is considered a service under Regulation 1501. If, because a client had

the same time, date, and location as a previous client, the previous client's profile is selected and furnished to the new client, the charge billed to the new client would be subject to sales tax. 5/12/93.

515.0011.510 **Industry Information Provider.** The "provider" is a corporation which provides nationwide services to a specific industry. The provider has an office and employees in California but its headquarters are located outside of the state. The provider gathers certain industry related information, analyzes the aggregate information, and then makes the information and a statistical analysis of the information available via noncustomized publications and reports provided to its members. Generally, all members subscribing for a specific service will receive the same publications and reports. These publications also are available electronically. No member receives a publication or report containing solely its own information. The publications and reports do not qualify as subscriptions of periodicals as described in Regulation 1590(b)(3). Only companies providing a specific type of product may become members. The two-part membership fee consists of a flat fee for membership for a specific state and a variable fee based upon the member's sales of the product in the state.

The provider provides its members with a variety of benefits besides the publications and reports. These benefits include providing customized information to individual members by contract; providing third party information such as credit reports; sending newsletters about the industry; holding membership meetings; filing information on behalf of members with regulatory bodies; and occasionally, representing the industry in other situations, such as before legislative bodies.

Under these particular facts, the provider is primarily a service organization and the charges for membership fees are not related to anticipated retail transactions. Therefore, under subdivision (a)(2) of Regulation 1584, charges for the provider's membership fees are not subject to the tax.

The separately stated charges for noncustomized publications, reports, and contracts which a purchaser receives in the form of tangible personal property are subject to tax since the purchaser's primary interest is in obtaining the physical property, whether purchased by a member or a nonmember. However, if the publication, reports, or form contracts are delivered to the purchaser electronically by remote telecommunication, there is no transfer of tangible personal property and, therefore, the charges are not subject to tax. On the other hand, developing customized information for a member and providing it through a custom report to the member is a nontaxable service since the true object of the contract is the service of receiving the customized information, not the property produced by the service. 4/12/96.

515.0011.725 **Licensed Acupuncturists, Licensed Nutritionists, and Massage Therapists.** Unlike chiropractors, there is no statute classifying these practitioners as consumers rather than retailers of tangible personal property which they furnish in the performance of their services. As a result, they are sellers of the products such as vitamins, minerals, and dietary food supplements which they provide in connection with the service they provide to their patients.

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They are selling these products at retail whether or not they bill the consumer/patient separately for the products or include the products with their service and bill the patient lump sum. 3/28/91.

515.0011.775 **Licensing Agent—Providing Artwork.** A taxpayer is a licensing agent for owners of certain intellectual property rights such as cartoon characters (properties). Under the various license agreements with the owners of the properties, the taxpayer's art department agrees to provide artwork incorporating the properties for use by licensees. Under the agreements, all uses of the properties by third party licensees shall enure to the benefit of the owner. The taxpayer shall not have any interest or property rights in any of the properties. Under the various licensing agreements (except one), the taxpayer receives a licensing fee of 40% of the gross receipts paid by licensees. In the one exception, the taxpayer will receive a five percent increase in the royalty payments if any artwork is provided by its art department.

Under the contracts with the owner of the properties, the taxpayer is providing both a service and a sale of tangible personal property (artwork). Since the taxpayer provides a variety of services to the owner for a fee and does not separately state a charge for the artwork, the portion of the fee attributable to the sale of artwork is subject to tax on the fair retail selling price of such property. (Regulation 1540(b)(1).)

In the case where there is a five percent increase in the licensing agent fees when artwork is provided, the increased amount is consideration for the transfer of the artwork and, therefore, it is the measure subject to sales tax. 2/28/95.

515.0011.795 **Lithographer's Services.** An out-of-state retailer who has stores in California and other states hires a California lithographer to produce color separations. The lithographer sends hard copy proofs to the retailer out of state for approval. The retailer may make changes or not, but returns all the proofs after approval. After receipt of the approved proof, the lithographer sends the color separation to a California printer. The printer uses the color separation to print either direct mail advertising material which qualifies as printed sales messages under Regulation 1541.5, or inserts which are placed into newspapers as defined in Regulation 1590(a)(1). The inserts are shipped by the printer both to newspapers within and out of California. The ''printed sales messages'' are sent free of charge by a California mailing house to individuals both inside and outside the State of California. The retailer believes that the true object of the contract between the retailer and lithographer is the service provided by the lithographer.

The retailer specifically desires tangible personal property, that is, satisfactory color separations to use for printing newspaper inserts and printed sales messages. Hence, the lithographer made a taxable sale of the color separations to the retailer. The lithographer is not providing a mere service but rather is selling tangible personal property by delivering that property to printers in California on its customer's behalf. That sale is subject to tax. 11/25/96.

515.0011.825 **Loan of Sterilization Equipment.** A taxpayer manufactures and distributes dispensers for use in cleaning dishes, glasses, and utensils in

restaurants and bars. The dispensers mix detergents and germicides with water. The taxpayer enters into agreements with customers to furnish dispensers in return for the promises of the customers to purchase all detergents and germicides from the taxpayer for the period of one year. The agreement provides that the dispensers are not for sale, but are loaned. The taxpayer retains ownership of the dispensers. The taxpayer delivers the detergents and germicides and calibrates and repairs the dispensers. Customers are usually visited at one month intervals to deliver detergents and germicides and to service the dispensers. Special trips are made when necessary. A lump-sum charge is made.

The true objects of the contracts are the dispensers, detergents, and germicides. Any services provided by the taxpayer are rendered incidental to the sale of tangible personal property. The entire charge is taxable. 11/18/93.

515.0011.910 **Maintaining a Book of Remembrance.** A society in California will be maintaining a Book of Remembrance at its columbarium to provide a lasting record and memorial. A memorial entry will be inscribed in the Book of Remembrance under the date of death. The book is the personal property of the society and a remembrance card with a protective PVC coach-hide wallet will be provided to persons who wish to have a copy of the inscriptions as they appear in the book.

The charges made by the society for the inscription in the book are not subject to sales tax. The fact that a folded remembrance card may be furnished to the client does not change the overall nature of the transaction from a service transaction to a sales transaction.

However, tax applies to charges made to the society for the Book of Remembrance and for the folder remembrance cards. Also, charges made to the Society for lettering and inscription work are taxable. 8/16/90.

515.0012 **Market Research Reports.** Market research reports sold to interested parties are sales of tangible personal property subject to tax and not nontaxable services under Regulation 1501. In order to qualify under Regulation 1501, the purchasers would have to enter into a contract with the market researcher before the research was conducted rather than merely purchase subscriptions, whether before or after the research is conducted. Even if the purchasers contracted in advance to purchase all issues of the report, this would be regarded as on-going subscriptions and not as contracts to commission specific research. Altering the subscription price based on the number of subscriptions sold or based on market share does not make sales of the report a service. 8/14/89.

515.0012.100 **Matching Database.** A firm receives a database of customers from its client. It matches the client's data base against its own database. A report is generated which provides additional information to the client about its customer. In some cases, the client requests a mailing list containing the names of persons who closely match the list furnished by the client. The report furnished to the client may be printed or on a floppy disk. The matching of data bases and the reports prepared constitute services. The true object of the contract under

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Regulation 1501 is a nontaxable service and the firm is the consumer of the disks and paper upon which the data is transmitted. 3/30/89.

515.0012.400 **On Line Advertising.** A firm carries advertisements on line for goods in much the same manner as classified ads in newspapers. Both buyers and sellers register with the firm. Fees are charged sellers for the advertisements. The seller sets a minimum sales price and the item is open for bid for varying periods. Prospective buyers place bids. The firm does not have authority to accept or reject bids. If the item sells, the firm receives a percentage of the sales price. It does not provide any warranties, an escrow or otherwise become involved in the transaction. The firm does not acquire possession to the property nor does it have power to pass title. The buyer and seller handle all arrangements. The firm does not deliver any tangible personal property such as diskettes, manuals or other property to potential buyer and seller.

The firm is conducting a service, and it is not a retailer. It also has no obligation to pay or collect California sales or use tax which may be imposed on the transaction between the buyer and seller. 4/8/97.

515.0012.680 **Operator—Provided Sound Equipment.** A taxpayer is engaged in the sale and lease of sound systems and sound equipment such as horns, speakers, microphones and stands, and amplifiers. The taxpayer entered into an agreement with a movie studio to furnish a fully energized sound engineering system, the services of a sound engineer, and the tools necessary to operate the system. The agreement required the sound engineer to maintain, supervise, and personally operate the sound system. Further, all personnel provided by the taxpayer were deemed to be the taxpayer's employees.

In a true lease, the chief characteristic is the giving up of possession to the lessee, so that the lessee and not the owner uses and controls the rented property. Under the facts of this particular arrangement, the taxpayer did not transfer control of the sound system to the customer. Rather, the taxpayer maintained control of the sound system in that at all times, the sound engineer controlling and using the sound system was an employee of the taxpayer and under the taxpayer's control. Thus, this is not a true rental agreement. The gross receipts from this agreement are not subject to the tax. Rather, the taxpayer is the consumer of the sound system it used to fulfill the agreement and tax applies to the sale of the sound system to the taxpayer or to the taxpayer's use of the property, measured by the purchase price. 2/7/96.

515.0012.800 **Paging Services.** A company provides its customers with paging or radio telephone devices in connection with the furnishing of paging services. The true object of the agreement between the company and its customers is the provision of the paging service, not the paging device. The paging devices have no function whatsoever independent of the paging service. Without the continuous beeper service, the customers would obtain no benefit from the paging devices. The company provides paging devices only to those customers who subscribe to the paging services and does not offer a reduced price to customers who may own their own pager. 5/1/90.

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515.0012.820 **Play-by-Mail Games.** A taxpayer is a moderator of historical, science fiction, and fantasy games which are played through the mail in much the same way that chess is sometimes played through the mail. When a customer signs up for a game, the taxpayer sends the player a rule book which explains how the game is played. To play the game, the player indicates how he will move his units in the game by filling out a form the taxpayer provides or by sending the move on note paper. The taxpayer provides the services of evaluating the movements the player has made to determine the success of the moves. This back and forth process through the mail or occasionally by phone may last for several years until the game is eventually won or lost. The player pays $3.50 or more (depending on the game) for each move submitted.

If each player obtains the forms free of charge independently of purchases of rule books and independently of the charges for accepting turns submitted by the players, the taxpayer is providing a nontaxable service of moderating the play-by-mail games, and the forms the taxpayer uses are incidental to that service under Regulation 1501. This is based on the assumption that all charges for the turns are optional with the players and there is not a certain number of turns to which the player is entitled with the purchase of the rule book. Thus, no tax would apply to the charge made for the player to submit turns. However, tax does apply to the purchase of the forms by the taxpayer from the printer since the taxpayer is the consumer of the forms which are used incidentally in the service provided.

On the other hand, if the form and computer cards which the moderator provides to the players were integral parts of the game and the players submitted all their turns on either the forms or cards, depending on the game, then the services provided as moderator of the play-by-mail games are taxable as part of the sale of the forms and cards since the players could not participate without obtaining these items. In all cases, the initial furnishing of the rule book is subject to tax. 4/28/88.

515.0012.840 **Postcard Advertising.** An advertising firm offers advertising for its clients by placing postcards in restaurants. If a restaurant agrees, a rack is installed by the advertising firm and the restaurant gets its own postcard printed free of charge to be placed in one slot in the rack. Postcards are provided free of charge to patrons. The advertising firm furnishes the postcards, places them, and refills the rack. The clients are billed monthly for the advertising. Title to the postcards remains with the advertising firm.

The advertising firm does not sell the postcards to its clients since title to the postcards remains with the advertising firm. The advertising firm provides an advertising service to its clients and places its own postcards in the restaurants for the restaurant patrons to take free of charge. The advertising firm is a consumer of the postcards and the racks in which the postcards are placed. 1/18/95.

515.0012.880 **Preparation of Seminar and Seminar Materials.** A person writing and developing a seminar and the materials used in that seminar by the participants and presenters is regarded as performing services. Therefore, no sales tax applies to charges for these activities. The delivery of masters for printing participants' guides and making presentation materials is incidental to

the performance of those services and, thus, also not subject to sales tax. The person is the consumer of any materials used in the development of seminar and materials.

Charges for the reproduction of binders and participant materials are subject to sales tax. 1/7/91.

515.0012.885 **Price Updates.** A company in the business of retailing computer hardware, software, and related supplies also sells computer software to various pharmacies. The basic software program is intended to provide a basic operating system for the computer and, at the same time, contains drug prices on the most common drugs and drug products used by pharmacists. Contained within the basic software program are several specific files including a drug price file. The drug price file contains a listing of over 7,000 individual drugs and drug products, and their corresponding prices. The price update feature, which is sold for a flat fee per month, entitles purchasers of the basic program to receive price updates on those prescription drugs and drug products on a twice monthly basis. The information is transferred on a diskette according to the customer's special requirements.

The company copies select information onto a computer diskette and delivers the diskette to the customers. The diskette is copied or produced in mass for each distribution. Since the company mass-produces the identical diskette for sale to hundreds of customers, the receipts are taxable as charges for the production, fabrication, or processing of tangible personal property and are not exempt receipts from the provision of services. 4/18/91; 3/27/92.

515.0012.900 **Property Inspections.** Sales tax does not apply to charges for inspection of property for real estate transactions to inform property owners of repairs needed to meet building code requirements. The inspectors do not do the needed repair work on the property. This is considered a professional technical service, not a sale of tangible personal property, even though written inspection reports may be furnished to clients. 6/7/90.

515.0013 **Providing Flyers and Other Services.** A service organization plans to provide service to real estate agents. They requested information regarding the following services:

1. Initially ''services'' provided will be the creation and mailing of flyers. Other ''services'' such as rubber stamps, presentation folders, and copying are available.

The flyers, that were reviewed, are circulars which advertise services. The true object of the contract is the brochure which is created and distributed. The transactions are retail sales of tangible personal property. The flyers qualify as ''printed sales messages'' and the exemption from sales tax applies if the requirements of Regulation 1541.5(b) are met.

2. As the operations continue to grow, additional services will be provided such as: liaison between lender, escrow and agent; meeting with appraisers, termite inspectors and others; clerical support; and statistical studies.

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Tax would not apply to the additional services provided that tangible personal property was not sold to the clients as part of these services (e.g. sale of standard statistical reports). 3/17/92.

515.0013.075 **Providing Workers.** A company provides only workers to an independent business without furnishing the place of work, any supervision of the worker or any materials, tools, equipment or supplies used in performing the work. The payment for the work is based merely on an hourly rate for the labor. The workers furnished will be considered ''special employees'' of the business to whom they are furnished and the furnisher will not be considered as producing, fabricating, or processing consumer furnished tangible personal property under Regulation 1526. It is immaterial that the workers may bring with them some of the tools required to perform a specific job. 6/6/75.

515.0013.850 **Sale of Educational Programming to Schools.** A nonprofit corporation sells educational programming services to school districts. These services feature science and language art curriculum which are broadcast nationwide via satellite with an interactive communications network linking students and teachers. The company charges a lump-sum school site annual license fee of $2,500 per curriculum. Also included with the site license fee are curriculum support available through 800 telephone numbers, one set of student magazines (30 magazines per set), one teacher resource guide, one basic science kit and/or literature starter set, and one video tape regarding parental involvement in education.

In this situation, there appears to be substantial value in instruction provided through the language, science, and professional development broadcast video series. Therefore, tax does not apply to the portion of the company's charge attributable to the broadcast services and curriculum support available through an 800 telephone number. However, sales tax does apply to the fair retail selling price of the student magazines, the teacher resource guide, the science kit or literature starter set, and the videotape. (See annotation 295.0140). 3/18/96.

515.0013.965 **Scholarship Report.** A company provides a scholarship matching service designed to assist college bound high school students, college students, and parents of both groups in finding private-sector scholarship funding for higher education. Using a database, the service provides: (1) a cover letter describing the different types of awards; (2) suggestions on applying for awards; (3) a suggested form letter to be used when requesting information from scholarship sources; (4) a search summary; and (5) a detailed description of each of the sources available in the student's field(s) of interest.

It is assumed that each search summary and the accompanying descriptions will not be a ''canned'' or standardized report which is sent to other students and that the contract price with each student covers the full cost of compiling the information which goes into the search summary and accompanying description. Based on these assumptions, the transactions for the search summary and descriptions are nontaxable services. The form cover letter and suggestion

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documents are also considered to be tangible personal property provided incidental to the service, and the charge is not taxable. 7/2/92.

515.0014 **Scholarship Search and SAT Preparation Program.** A company provides students with a computer produced personalized report detailing grants, scholarships and student aid programs the student is most likely to qualify for. It also provides an outline illustrating the steps the student needs to take to apply and receive the student aid awards listed. It appears the report is generated from a database in response to a questionnaire provided by the student. The report provides information which is unique to each student, even though a portion of the report may be identical for all students. It is assumed that the unique portions of the report greatly outweigh the identical portions.

The company also provides a SAT preparation program. Students take a simulated SAT test which the company analyzes by a computer program. It then provides the students with a report designed to help them solve the questions they got wrong or didn't understand and other test taking strategies they can use to raise their scores.

Based on information provided, the company is providing a nontaxable service. The company is the consumer of the property it incidentally transfers to the students and must pay tax on its purchases of such property. 10/9/92.

515.0015 **Schools.** Schools which provide significant educational services, including classroom instruction, are consumers of printed instructional matter and special instructional sound recordings furnished to students where tuition charges made to students do not separately state charges for such teaching aids. If a separate charge is made for such teaching aids, tax applies to that charge.

''Materials fees,'' which are charges for consumable supplies and materials used in the classroom, are not subject to tax. Schools are consumers of materials and supplies furnished to students for use in the classroom even though a separate ''materials fee'' may be charged to the student.

Schools which provide significant educational services, including classroom instruction, are retailers of test equipment, kits for building items such as television sets, and other durable goods furnished to students even though no separate charge is made to students for these items. Ordinarily the measure of sales tax will be regarded as the cost of the item to the school. If a separate charge is made, tax applies measured by such charge.

For application of the tax to charges made by correspondence schools, see BTLG Annotation 295.0140. 3/31/80. (Am. 2000–3).

515.0015.500 **Seminars.** A taxpayer presents educational material to the general public. The price includes course material and lunch. If the presentation includes significant classroom instruction, only the charge for the lunch is subject to tax. While the charge to the participants other than the lunch is not taxable, the sale of the course materials to the taxpayer is taxable.

If the seminar consists only of a short speech (i.e., no significant classroom instruction) at lunch and the participants are required to purchase the lunch in

order to hear the speech and obtain handout materials, the transaction would be treated as a sale of lunch and the handout materials and the entire charge is subject to tax.

The taxpayer also presents seminars dealing with a software package which it sells. The charge for the seminar is billed separately from the software. If the customer is not required as a condition of buying the software to purchase the seminar, the charge for the seminar is not taxable. 4/29/92.

515.0015.800 **Service Enterprises Generally.** Specialized equipment located in hospitals or doctor's offices is used to transmit certain medical data over telephone lines to an independent monitoring service. The service is performed under a doctor's prescription and covers heart arrhythmia/syncope monitoring. The transmittal results in an EKG strip which is then either faxed or mailed to the doctor.

Although the result of the monitoring service is presented to the doctors or hospitals on paper in the form of an EKG strip or facsimile thereof, it is clear that the true object of the contract is obtaining the monitoring service. The tangible personal property involved is transferred incidentally to the performance of this service. Charges for the monitoring service are not subject to sales or use taxes. 10/29/90.

515.0016 **Services Related To Real Property Rentals.** The furnishing of an original set of keys or replacement keys and changing locks are services related to the rental of realty. The lessor is the consumer. Tax does not apply to the charge to the tenant for these services even if the lessor marks up its costs in arriving at the amount charged to the tenant. 5/24/94.

515.0016.200 **Servicing Medical Equipment.** A medical equipment company has a contract with a hospital to store, clean, maintain, inspect, deliver, and retrieve medical equipment owned by the hospital. There is no transfer of tangible personal property to the hospital when providing such services. The company does, however, install parts and commode buckets replacements which are provided by the hospital.

Since the medical equipment company did not provide any tangible personal property, it is providing a nontaxable service to the hospital provided none of its installation constitutes fabrication (e.g., putting together new property.) 2/5/96.

515.0016.500 **Shared Use of Computer and Files.** Pursuant to a Joint Powers Agreement, a group of local governments purchases and operates a computer system. A library district which is not a party to the agreement is granted access to the computer which has the district's database information which was, in the past, merged into the database of one of the members of the Joint Powers Agreement. The access allows the library district to update the database. The library district is charged a one time fee for a simultaneous user port, 50,000 item records, and 1,000 bibliographic records. It also pays a monthly maintenance fee which represents a pro-rated share of the expenses. No tangible personal property is furnished (e.g., computer hardware, software, or records in tangible form).

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The contract is not for the sale or lease of tangible personal property but only computer access and space on the hard drive that is accessed by remote telecommunications. Tax does not apply to the initial charge or the monthly prorated charge. 10/10/96.

515.0016.600 **Shipping Service.** A firm purchases envelopes for overnight express service at a discount and sells the envelopes to others. The envelope is used by the overnight express company in essentially the same manner as the U.S. Postal Service uses postage stamps. Therefore, the supplier is making nontaxable sales of shipping services (by selling the prepaid ''mailer'') and the firm in turn is making nontaxable sales of shipping services rather than selling tangible personal property. However, if the firm transfers any other tangible personal property other than the envelope, the firm will be regarded as making taxable sales of such properties. For example, if the firm provides its customer with shipping materials such as ''popcorn'' for use by the customer to insulate the contents of the customer's shipments, the charges for such property would be subject to sales tax. 5/24/96.

515.0017 **Sign Design.** A taxpayer provides designs for signs and other design work for architects. The taxpayer furnishes drawings, sketches, models and mockups to his clients. The architectural firms or their subcontractors use the taxpayer's drawings. The true object of the contracts is regarded as the tangible personal property which the taxpayer delivers to his clients. The entire charge, including design labor, is subject to tax. 10/26/94.

515.0018 **Support Activities.** A computer aided drafting company charges for support activities and believes the true object of the contract is the services rendered in producing the output and not the output itself.

Although a great deal of the value of the tangible personal property provided is the result of labor, the true object of the contract is the output. The charges are subject to tax. 3/23/92.

515.0018.550 **Taping Television Broadcasts.** A taxpayer tapes television news broadcasts to the order of clients. The client identifies the particular story which was of interest. The taxpayer edits out commercials, weather, announcements, etc., and transfers the edited tapes to the clients. The taxpayer has contracted for the sale of tangible personal property and tax applies to the taxpayer's entire charge.

(Note: This transaction differs from a clipping service. In this transaction, the client identifies the specific story to be taped. In a clipping service, the firm selects the stories to be ''clipped'' based on general direction of the client regarding issues of interest. In the case of the clipping service, there is a selection and identification service which is the true object of the contract. Here the item contracted for is tangible personal property, i.e., an edited tape). 1/5/94.

515.0018.800 **Technical Library, Drawings and Designs.** A company agrees to sell to a firm certain assets which include a technical library, drawings and designs. The technical library is written on paper and bound in binders. It

documents the techniques used by the company's personnel to produce the finished product. The drawings and designs consist of pre-drawn or scientific diagrams, blueprints, detailed drawings, and schematics of the company's products. They include tolerances, dimensions, inputs and outputs. All the drawings, designs, binders, and the like are in existence prior to the sale.

The transfer of these items is considered the transfer of tangible personal property. Thus, the total price set by the parties for the sales is subject to tax. 5/6/92.

515.0018.930 **Television Decoding Devices.** A television broadcaster makes a charge to subscribers for the programs which it broadcasts. The programs are broadcast in scrambled form. The subscriber receives a decoding device. A charge is made for rental of the decoder and a separate charge is made for providing the programming. Tax applies to the receipts from the rentals of the decoders unless the broadcaster purchases them tax-paid. Tax does not apply to the charge for providing programs or to security deposits on the decoder. 11/26/80.

515.0019 **Television Survey Reports.** In general, there is no exemption from tax for the sale of information when it is delivered in tangible form. The only issue to consider is whether the customer has contracted for the information itself or for the service of compiling the information. Sales of specialty type products such as DMA maps, DMA's by territories, working studies and annual reports are taxable when delivered on tangible media in California. In addition industry wide market data, including general reports on various industry segments and standard micro-computer programs, are not for compiling services and are also taxable when delivered on tangible media.

Sales of ''local market surveys'' are also sales of tangible personal property. These ''surveys'' previously qualified for exemption as periodicals. However, since the exemption for periodicals was repealed effective July 15, 1991, all printed ''local market surveys'' sold at retail in California or purchased for use in California are subject to tax. (Note: Operative November 1, 1992, subscription sales of periodicals delivered by mail or common carrier are not taxable.) 4/17/92.

515.0019.200 **Temperature Monitoring Devices—Service vs. Lease.** A contract under which a firm provides in-transit temperature monitoring devices to carriers is a contract for services even though physical possession of the device passes to the carrier. The device records the internal temperature of the cargo compartment of the vehicle without the presence of the provider's staff. The presence of the device may tend to inhibit false spoilage claims. The instruments must be read by an expert and the provider extends further cooperation without additional charge. The instrument is of no direct benefit to the carrier and the testimony of the provider's staff in arbitration or court proceedings over liability for spoilage is the most desired of the contract benefits. On balance, the true object of the contract is not the possession of the device. Thus, it is a contract for services, not a lease of tangible personal property. 2/28/80.

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515.0019.300 **Temperature Recorders—Vans.** A taxpayer manufactures and sells temperature recording devices to common carriers that operate refrigerated vans for the shipment of perishables. The devices are primarily sold for a one time use but the taxpayer will sell the devices at a reduced price if a customer agrees to return the device after the chart is removed. At the end of a trip, the chart recording temperatures in the van is removed and examined by the carrier. The recorders do not have to come back to the petitioner for reading as is necessary for other types of recorders. There is a key distinction between these recorders and those which require reading by the vendors which the Board has recognized as temperature verification services. In this case, since the taxpayer has no further duties with respect to the device after it is sold, the taxpayer is selling tangible personal property at retail, not providing a temperature monitoring service. 4/3/95.

515.0019.700 **Transfer of Real Estate Information on Disks.** A taxpayer is in the business of providing commercial real estate information to its customers through a license agreement. The taxpayer maintains a database of commercial real estate information for certain geographic regions which is updated daily. The taxpayer compiles this information on computer disks and CD ROMs which it provides to customers on a temporary basis.

Where a transaction involves the delivery of tangible property which includes information generated from a pre-existing database, the transaction is a sale or a lease of tangible personal property and is subject to tax unless an exemption otherwise applies. Since the taxpayer is providing its numerous customers with noncustomized information on computer disk and CD ROM at a standardized price, the true object sought by the taxpayer's customers is regarded to be the disks and CD ROMs for the information contained in those items and not the providing of a service by the taxpayer. Therefore, the taxpayer is leasing disks and CD ROMs to its customers which are not in substantially the same form as acquired. The taxpayer must collect tax on the rentals payable for its disks and CD ROMs and remit these amounts to the Board. 10/8/96.

515.0020 **"True Object of Transaction" Test.** In distinguishing between the sale of a service (nontaxable) and the sale of tangible personal property (taxable) it is necessary to determine the true object of the transaction, i.e., is the real object sought by the buyer the ''service'' per se, or the finished articles produced by the service?

The court in *Albers* v. *State Board of Equalization,* 237 Cal.App.2d 494, in holding the tax applicable to the receipts of a draftsman, explained the distinction as follows:

''Plaintiff herein was not paid to conceive or to dictate any of the ideas, concepts, designs, or specifications in the drawings made by him. He simply applied his ability to the details supplied by the customer for the purpose of putting such details down on paper and thereby producing a drawing for use by the customer. In other words, the customer was purchasing the detailed drawing for his use, he was not purchasing the design or specifications pictured in the drawing.'' 7/11/66.

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515.0026 **Service or Sale.** A taxpayer creates exhibits for the use of attorneys at trials. The activity may involve the taxpayer's taking video tapes, computer animation, charts, illustrations, etc. and recording them on a laser disk for access and display during the trial. Inasmuch as the true object of the contract is the acquisition of the disk rather than the services used to create the disk, the transaction is a sale of tangible personal property. The gross receipts (the entire amount paid for the disk) is subject to tax, with no deduction for any expenses such as mileage, transportation, meals, copies, etc., as provided in section 6012. 8/22/94.

515.0027 **"Special Employees"—Keystroking Services.** The performance of keystroking services to enter data from source documents to magnetic computer disks for a customer is taxable fabrication labor unless the services are performed by "special employees" on the customer's premises. The distinction is whether the taxpayer is engaged to produce a finished product, or to provide personnel who will work under the direction and control of the customer.

In this instance, the taxpayer's people were involved in handling the overflow of work normally done by the customer's staff and the customer's office manager assigned the tasks to be done. The supervisor provided by the taxpayer was only required when there were six or more temporary employees on a shift, and the contract specified that the work would be done ". . . as requested and directed by . . . (the customer)." Under these circumstances, the keystroking services were performed by "special employees" and the charges were not subject to tax. 12/19/79.

515.0028 **Satellite and Radar Images.** Company A obtained satellite images from the U.S. government in a digitized format on magnetic tape. A reproduced visual images of the earth's surface from the tape. A then enhanced certain portions of the image to produce a more useful image of the area. A sold enhanced images to C.

Company B produced a radar mosaic of the same area using the results of a radar survey which it had acquired. The mosaic is an enhancement of previously obtained radar images. B sold enhanced images to C.

The image and the mosaic were utilized by a geologist employed by C to discover physical characteristics of the area covered by them.

Both A's and B's sales are retail sales of tangible personal property. The true object of each contract was the visual representation, not the engineering data produced by the vendor. Both transactions are subject to tax. 9/18/90.

515.0029 **Music Lessons—Instrument Sales.** A guitar studio offers a thirty week guitar course for a total price of $369 payable as follows: $69.00 at the time of enrollment and the balance of $300.00 payable at $10.00 each week over the thirty week course period. In addition to the course instruction, the contract provides that the studio will furnish "an acoustic guitar for home practice, complete with sheet music, picks, and strings necessary to course." Finally, the contract provides that the guitar remains the property of the studio if the student discontinues lessons at any time prior to completion of the course, and that, in

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such case, the student must return the guitar. However, students completing and paying for the entire course will own the guitar. No refunds are permitted on any portion of the contract price. In the contract, the guitar is shown as selling for $64.79 plus sales tax. This amount is equal to or more than the cost of the guitar to the studio.

Under this contract, the transfer of the guitar is clearly not incidental to the providing of the guitar lesson. Therefore, the transaction constitutes taxable sales under which possession of the guitars are transferred upon delivery to the students with the studio retaining title thereto as security for the payment of the price. Sales tax is measured by the separately stated sales price ($64.79) stated in the contract. In the event that the studio should repossess a guitar because a student has not paid the entire contract price, the studio would be entitled to a bad debt deduction only if the wholesale value of the repossessed guitar is less than the net contract balance at the date of repossession.

The sheet music, picks, and strings furnished by the studio to its students are items which are incidental to the provisions of the guitar lessons. Consequently, the studio is the consumer of these items and is liable for tax measured by the purchase price of these items. 8/13/83.

515.0030 **Charges for Photocopying Documents.** Tax applies to charges by persons in the business of photocopying documents and serving subpoenas in connection with such photocopying services for:

(1) pick-up and delivery of original documents

(2) duplicating property such as X-ray (positives or negatives), photographs, fetal monitor strips, and slides

(3) copy documents, per page charge and basic copying charge

(4) paginate and bind copied documents

(5) making telephone arrangements to schedule copying of documents, and

(6) pick-up and delivery of copied documents

(7) advance fees for witnesses or cost to obtain records where the charges are merely costs to the photocopy company to produce the photocopies

(8) sending and receiving facsimiles and performing general clerical tasks if the costs are incidental to the sale of the photocopies; and notarizing documents if it is a service that is a part of the sale of the photocopies.

Tax does not apply to charges for:

(1) preparing court submittals such as subpoenas and certificates of no records

(2) delivering prepared court submittals to the court

(3) serving subpoenas, and

(4) skip tracing if it is for the purpose of serving the subpoena. 8/30/93.

515.0031 **Computer Program Translation Services.** The translation of customers' computer application program codes to make the programs useable on a different brand of equipment is custom computer programming excluded

from ''sale'' and ''purchase'' tax as it meets the criteria of modification to an existing program pursuant to section 6010.9(d). However, the translation of file records or data does not qualify for exclusion from that definition as they are not programs as defined in section 6010.9. They are also not exempt services as the true object of the contract is the property produced by the translation service and not the service per se. Charges for this service are subject to sales tax. 9/25/85.

515.0032 **Copies of Original Report.** A consulting firm in the broad field encompassing the development and management of natural resources contracts with clients to provide a written report detailing the results of its technical findings. In many contracts, the firm is required to supply clients with additional copies of the original report. The firm has been paying sales tax reimbursement to the printer.

Consulting firms are generally engaged in a service enterprise and are the consumers of the property which they use incidentally in rendering this service. This is so even though the property is transferred to their clients in the form of a written report. However, when these firms supply additional copies of the reports, they are regarded as the retailer of these additional reports. Accordingly, the firm should take out a seller's permit and collect tax measured by the selling price of the reports that are delivered and used in California. Of course, the retailer can, in such a case, issue a resale certificate to the printer for the charge the printer makes for the additional copies. It should be noted that the resale certificate only covers the actual cost of printing the extra copies and not any charges made for setting type, etc., which is attributable to the original printed report. 3/21/73.

515.0033 **Material Distributed to Students.** A local unit of a national yachting organization promotes skill and safety in handling of small recreational boats through a system of formal education. All course material is prepared by the national organization and distributed for a small fee to local units for use in their classes. The local units distribute the material, collect the fees from each student and forward the fees to the national organization. Also, a small charge is made for use of test documents which are returned to national after each examination for grading.

The course materials provided to the students are considered instructional matter, not consumable supplies and materials. Since a separate charge is made to the students for the instructional items, such charges are subject to sales tax. The exemption under section 6409 (health and safety materials) is not applicable since this exemption is a use tax exemption, not a sales tax exemption.

With respect to the fees paid by the students for tests, the fees are not subject to tax. The local unit is rendering a service. The local unit, however, must pay the use tax on its cost for the test material unless the section 6409 exemption applies. To qualify for the section 6409 exemption, an organization must qualify for the ''welfare exemption'' under Revenue and Taxation Code Section 214. 1/6/92.

515.0034 **Medical Emergency Response Card.** A firm sells medical emergency response cards. Customers provide their medical histories and medical data to the taxpayer. Customers may then arrange by telephone for electronic transmission

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of this information from the taxpayer to physicians and other authorized parties. The card also serves as a telephone debit card. The customers prepay a certain amount and deductions are made from the prepaid amount for any telephone service provided.

The firm is providing a service. Tax does not apply to charges by the firm to the customers. Tax applies to the sales of the cards to the firm. 11/4/94.

515.0035 **Storage of Printed Material.** A retailer of printed material enters into an agreement with a customer to print materials and ''store'' the materials on its premises for one year. After the first year, the customer decides that it would like to continue the storage agreement. An additional charge will be made for the subsequent storage.

Assuming the sale of the printed material has been completed and title has passed to the customer, the charges are nontaxable charges for a service. If, however, the charges are for storage prior to the sale and passage of title, such charges are part of taxable gross receipts. 1/27/92.

515.0040 **"True Object of Transaction" Test.** The basic distinction in determining whether a particular transaction involves a ''sale'' or a ''service'' is one of true object of contract; i.e., is the real object sought by the buyer the ''service'' per se, or the finished article produced by the service? If the true object of the contract is the service per se, the transactions would be nontaxable even though some tangible personal property is transferred. 5/4/65.

515.0060 **"True Object of Transaction" Test.** The business activities of a company offering training aids and programs were classified as sales of property or service for sales tax purposes. Charges for the first category, consisting of time surveys, evaluations of existing training programs and the issuance of recommendations, were not subject to sales tax because the charges were for exempt services and no tangible personal property was produced or transferred to the customer. The training aids and programs under the second category, which consisted of films, slides, tapes, and reproduced printed manuscripts, were taxable because the end product desired by the customer was tangible personal property. 1/21/70.

515.0061 **Writing Words Only.** A taxpayer is in the business of writing print ads and brochures for clients. The taxpayer submits work to clients in typed form or on a computer disc. The clients then turn the taxpayer's work over to a graphic designer who incorporates the written words into the final artwork. In summary, the taxpayer simply writes the words that are made part of the finished product by someone else.

Since the taxpayer provides words (text only) to its clients, the taxpayer is considered an author performing nontaxable services. 1/27/94.

515.0062 **Water Treatment—Sale or Service.** A company offers a contract for water treatment which includes extensive testing of items such as cooling towers and boilers, as well as efficiency studies, inspections, training, special studies as needed, etc. As part of the program, the company provides all chemicals

necessary for the treatment of the water in the system. In addition, there is a one time charge for test kits and solution. Some contracts require the company to feed the chemicals into the system, and some contracts require that the chemicals be delivered, with the customer being responsible for feeding the system. All contracts are on a lump-sum basis, with no amount specified for the chemicals provided. Neither the chemical element or the service element of the contract is insignificant.

When the company feeds the system, it is the consumer of the chemicals provided and the retailer of the test kits and solution. When the customer feeds the system with the chemicals delivered by the company, the company is the retailer of the chemicals as well as the test kits. The gross receipts from the sale of chemicals is the list price at which they would be sold to others not under a service contract. 4/8/94.

515.0062.200 **Web Site.** A firm creates and maintains web sites for its client. The customer furnishes hardware and software for the design of an Internet web site. The software is modified by a third party to make designs compatible. Ultimately, the hardware and software are returned to the customer to host on its own equipment or another Internet service provider (ISP). Assuming that the customer is not provided any copies of the modified software (i.e., floppy disks, etc.,) or any other tangible personal property, such as program documentation or manuals, and all materials are returned to the customer, the firm is not making a taxable sale or fabricating property for a consumer. It is a reprogramming or reconditioning computer hardware provided to it by modifying the existing software in order to create a computer website. 10/10/96.

515.0062.500 **Web Site—Advertising Property for Sale.** A company has an office in California and a web-site on a California server where online sellers and buyers can buy and sell tangible personal property using an online auction format. The company charges an initial fee and a nonrefundable listing fee to online sellers who use the web-site unless there are no offers made on the listed property. The person with the highest price by the end of the time allotted for the listed property is deemed the buyer and instructed to contact the seller. Arrangements are made between the seller and the buyer for the payment of and the delivery of the items. The company does not advertise or otherwise hold itself out as an auctioneer, never holds either title or possession of the advertised items, and has neither the power to transfer title or possession of the items, nor the power to bind the seller and buyer to the sale. In this case, the company is providing a service only and is not the retailer of the items advertised on its California server's web-site. 9/9/99. (2000–2).

515.0063 **Consultation, Installation and Handling Charges.** A taxpayer was hired to review a customer's office situation, recommend a computer network, and provide and install that network. The taxpayer charged the customer separately for the consulting, handling and installation. If the taxpayer provided consultation only and the contract did not provide for any transfer of tangible personal property to the customer, the charge for consultation would not be taxable.

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However, under the facts in this situation, the contract provides for the sale of tangible personal property to the client. As a part of this contract, the taxpayer provided preliminary consultation and recommendations regarding which computer network to acquire. This would be a contract for sale of the tangible personal property, and the consultation and handling would be a part of that sale. However, the charge for installing the property is not subject to the tax. 12/2/91.

515.0064 **Facsimile Transmission.** The charges for sending or receiving a facsimile transmission via phone modem are not subject to sales tax. 12/8/94.

515.0065 **Seismic Data Acquisition and Processing.** When the acquisition of seismic data is accomplished by a service company's field crew and includes the extensive involvement of licensed professional engineers exercising their professional judgment in making a wide variety of decisions to assure the most accurate information possible is obtained and the product of these efforts is delivered to the customer in written report form, the true object of the contract is the engineering services and the charges are not subject to tax.

The raw data may be referred by the customer to a processing company for refinement. This procedure involves many discretionary tests and decisions to remove extraneous ''noises'' and to make the data more accurate and usable. The true object of this contract is the development, through computer manipulation, of original data from raw data furnished by the customer. This constitutes ''processing of customer-furnished information,'' which is nontaxable under Reg. 1502, as is any tangible personal property incidentally transferred therewith.

A single contract for acquisition and processing is also not taxable. 4/16/86.

515.0066 **Cable TV Converters & Remote Controls.** When a cable TV company provides a subscriber with a signal converter (decoder), the true object is to allow the viewer to make use of the service subscribed to, i.e., the encoded programs transmitted via the cable. The subscription agreement does not contain a separate charge for the decoder nor does the subscriber have to request a decoder as an ''extra'' to the contract. The decoder is tangible personal property incidentally provided pursuant to a service contract.

The remote control unit is separately stated in the contract with a separate amount charged for it. It is not physically attached to the cable system in any way. Remote control units are leased and the lease receipts are subject to tax if not purchased tax paid and leased in the same form as acquired. 6/5/87.

515.0067 **Performing Laser Light Shows.** A company which contracts to perform laser light shows for various events (e.g., conventions, fairs, grand openings, celebrations, etc.) by furnishing equipment together with personnel who retain possession of the equipment is providing a service rather than leasing the equipment. Charges for performing these shows are nontaxable. The company is the consumer of the equipment used to perform the service and tax applies to the sale of the equipment to the company. On the other hand, if the equipment is set up on a client's premises and is left without an operator, the company is considered as leasing the equipment and tax would apply as stated in Regulation 1660. 12/4/89.

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515.0068 **Providing Instructional Material.** A firm is in the business of assisting its clients in developing instructional material to be used in the client's training program. It consults with the client and subsequently develops a participant's guide and an instructor's guide plus transparencies which have only text. One copy of each is delivered to the client. It also develops a script of dialogue to be used in a videotape to be produced by the client.

The transfer of a script for a videotape, participant's and leader's guides, and the transparencies consisting of only text, is incidental to the performance of a service. Accordingly, tax does not apply to the charge to the customer. However, the firm is the consumer of the materials used to produce the property and tax applies to the purchase price of such material. 12/8/89.

515.0069 **Training Schools—Use of Master Printing Plates.** A taxpayer provides seminar services and training to companies in the area of sales and services. In some instances, the taxpayer also provides the client with training program material and/or master plates from which the client can print the material themselves. There is a fee for the use of master plates and a license for the right to use these plates which must be returned by the date specified in the contract.

If the taxpayer does not make a separate charge for the training materials which it furnishes to participants when providing significant education services including classroom instructions, then the taxpayer is regarded as the consumer of such materials and tax applies to the cost of such materials to the taxpayer. If, however, the taxpayer makes a separate charge for such materials, the taxpayer is a retailer of such property and tax applies to such charges.

However, when the master plates are furnished, the taxpayer is leasing the master plates to its customers since there is a transfer of possession of the plates to the customer. Thus, the rental receipts from such leases are subject to use tax since plates are not in substantially the same form as acquired by the taxpayers. Such taxable amounts include the fee for the use of the plates and the license fee for the right to use the plates. Taxpayer's charges for the plates (rental receipts) are taxable whether separately stated or not. 1/27/94.

(b) COPYING AND TRANSCRIBING

515.0070 **Depositions.** Private court reporters perform a service when they report depositions in connection with current or proposed litigation. Pursuant to Code of Civil Procedure Section 2019, upon request or upon the payment of reasonable charges therefor, a copy of the deposition must be furnished to any party to the litigation. The charges for such copies are regulated by statute.

The sales tax applies as follows:

(1) Sales to the party contracting for the service. Tax does not apply to original copies (and carbon copies made at the same time as the original) furnished to the party contracting for the performance of the service. Tax applies to transfers of all other additional copies to the party contracting for the performance of the service.

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(2) Sales to other parties to the litigation. Tax does not apply to the first copy (carbon copy or photo copy) furnished to other parties to the litigation. Tax applies to additional copies beyond the first copy furnished to such persons.

(3) Sales to persons not parties to the litigation. Tax applies to all copies sold to persons not parties to the litigation. 4/26/78.

515.0075 **Depositions.** Persons who make audiotaped or videotaped recordings of depositions in connection with litigation perform a service. Pursuant to Code of Civil Procedure section 2025, upon request of any party to the action, a party who records or causes the recording of the deposition testimony by audiotape or videotape, must furnish a copy of such tape to the other party on receipt of payment of the reasonable cost of making the copy of the tape. The application of the sales tax to charges for the videotapes or audiotapes is:

(1) Tax does not apply to the charge for the first videotape or audiotape furnished to the party contracting for the performance of the service. Tax applies to sales of all additional copies to the party contracting for the services.

(2) Tax does not apply to the charge for the first videotape or audiotape furnished to other parties to the litigation. Tax applies to sales of all additional copies to such persons.

(3) Tax applies to all sales of videotapes or audiotapes to persons who are not parties to the litigation. 8/27/87.

515.0077 **Depositions Furnished To Deponent.** Tax does not apply to charges for furnishing a copy of the deposition to a deponent since Code of Civil Procedure section 2019 provides that, upon payment of reasonable charges therefore, the officer shall furnish a copy of the deposition to the deponent. 9/27/78.

515.0080 **Form Letters.** The process of duplicating form letters should be regarded, for sales tax purposes as similar to mimeographing or multigraphing and the tax, accordingly, is applicable to charges for the furnishing of letters thus duplicated. 1/30/51.

515.0100 **Law Firms.** A law firm is not a retailer when the law firm reproduces documents or other printed matter for clients in connection with the conduct of litigation or the rendition of professional legal services even though a specific or separate charge may be made to the client for the copies or reproductions. 3/10/64.

515.0106 **Medical Records—County Hospital.** Upon request, a county-operated hospital is required by the California Public Records Act (Gov. Code Section 6250 et. seq.) to provide the patient with a copy of his or her medical records; and by Health & Safety Code section 1795, et. seq., to provide a patient with copies of all or any portion of the records which the patient has a right to inspect. Accordingly, a charge made by a county-operated hospital for a copy of a patient's medical records is not subject to sales tax. 2/9/94.

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515.0108 **Microfilm Billing.** A firm contracts with a doctor to microfilm the doctor's ledgers and send a copy of the relevant microfilmed portions as bills along with return envelopes to the doctor's patients. The true object of the contract is to deliver to the doctor's patients tangible personal property, the bill and the return envelope, on behalf of the doctor. Thus, the firm is selling tangible personal property to the doctor. The charges for this sale are subject to tax. 10/20/81.

515.0125 **Official Documents.** The basic rule regarding copies of public records is that when copies are transferred as required by the California Public Records Act (CPRA) or other law for a price charged in accordance with and under authority of law, the governmental agency has not made a ''sale'' of tangible personal property under section 6006, but instead has provided a governmental service. A price set by ordinance satisfies the requirement that the price is ''in accordance with and under authority of law.'' A price set by a county board of supervisors by resolution also satisfies the pricing requirement. 2/27/96.

515.0140 **Official Documents.** If the furnishing of copies of documents held by a municipality is made mandatory by statute or ordinance, the transfer of such tangible personal property for a charge approximately on a cost-reimbursement basis is a governmental act and the tax does not apply, whether the amount of the charge for the copies is fixed by law or by a public official. If, however, the furnishing of such copies is merely permissive, a taxable sale takes place. The above holds true whether or not the copies are certified. 8/4/64; 10/2/64. (Am. 2000–1).

515.0185 **Official Documents—Magnetic Tapes.** The Department of Motor Vehicles, as well as other state agencies, is required by the California Public Records Act (Gov. Code, § 6250, et seq.) to furnish copies of information in its records, including computer data, which is to be provided in a form determined by the agency. The act permits a reasonable charge. If the furnishing of copies of documents by a governmental agency is mandatory by statute, the furnishing of the copies is a governmental service and not a taxable sale even though a charge is made in accordance with the statute. On the same principle, the furnishing by the Department of Motor Vehicles of information concerning drivers' licenses, when the information is furnished in the form of magnetic tapes, punched cards, or printouts, is not a taxable sale even though a charge is made. 1/29/75.

515.0187 **On-Site Billing Service.** Taxpayer operates a ''mobile'' billing service where it provides billing services to the medical profession. Taxpayer makes photocopies of accounts receivable ledger cards, folds, inserts the copies together with return envelopes into window envelopes, meters and mails the statements. The copy paper and envelopes are provided by the taxpayer. A lump-sum charge is made.

The photocopying is regarded as sales of photocopies which are taxable. The sale of the envelopes is taxable. The folding, inserting and mailing would be exempt only if the charge was separately stated. In this case, the metered postage

could be identified even though not separately stated. Accordingly, only the charge for the postage is not subject to tax. 7/14/75.

515.0188 **On-Site Photostat Copies.** A taxpayer does on-site photo copy work for law firms and other companies as a subcontractor. When billing a client, separate charges are made for machine transportation and set-up fee, an hourly rate for time spent on the job, and twenty cents per copy.

In this case, the sales tax applies to the entire amount charged, including the machine transportation and set-up fees, the hourly rate, and the per copy charge since the contract is to provide copies of documents which are sales of tangible personal property. In those cases where the taxpayer performs the photocopying work as a subcontractor, the sale may qualify as a sale for resale provided the other company intends to resell the copies to another purchaser. However, such resales should be supported by a complete resale certificate, issued timely, and taken in good faith.

Additionally, items becoming a component part of the property transferred to the client, i.e. copy paper, binder clips, toner, etc., may be purchased ex-tax for resale. Items not transferred to the client are considered to be consumed and may not be purchased without tax. 11/13/92.

515.0190 **Payments Made to Obtain Records.** A charge by a doctor for furnishing a patient's medical records to a photocopy service is an expense incurred by the service in obtaining access to the records which should be included in the ''sales price'' for purposes of determining sales tax liability. The fact that the photocopying service elects to pass the expense on to the customer without a mark up does not alter the result. 6/13/77.

515.0193 **Payments Made to Obtain Records.** The charge for preparing and serving a subpoena duces tecum is nontaxable even when made by a copying service which also makes a taxable charge for copies of records. The charge for preparing and presenting a written authorization for an attorney, pursuant to Evidence Code Section 1158, is nontaxable. 11/25/81; 1/2/85.

515.0220 **Public Stenography—Mimeographing.** In general, public stenography constitutes the sale of a service and the sales tax does not apply. The sale of mimeographed material, however, is subject to tax. 1/1/61.

515.0225 **Reverse Engineering.** Pursuant to a reverse engineering agreement, a firm is provided with an instrument by a client, for the purpose of disassembling and evaluating it. The firm then prepares and delivers drawings on velum, which are needed by the client to design and assemble printed circuit boards. The taxpayer also prepares and delivers a listing of parts and materials, plus assembly instructions for the instrument. The firm designates the charge to the client as ''reverse engineering''.

The client examines the reverse engineering package and decides whether to begin mass production of the instrument. If it decides to proceed, the client either has the firm or another manufacturer begin production, under a separate agreement.

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The drawings are transferred for the purpose of conveying information and not for use in manufacturing the instruments. The assembly instructions appear to be based on engineering expertise and are important aspects of the reverse engineering agreement. Based on these conclusions, the firm's reverse engineering is a nontaxable service. If the firm also mass produces the instruments, the reverse engineering would still be regarded as nontaxable service provided that there was no production contract in place, between the parties, to produce the instruments before completion of the reverse engineering package. 4/25/88.

515.0228 **Student Transcripts.** Sections of the California Education Code provide that a student has the right to access all records relating to that student. ''Access'' includes a personal inspection and review of photocopy or any such record. If the copy is furnished for a fee not exceeding the cost of making the copy, a sale is not involved, as the transfer is not a result of a contractual agreement, but an act required by law. 6/4/90.

515.0230 **Survey Copies.** A company produces generic reports and sells duplicate copies of the reports. Custom reports are also prepared. Tax applies to copies of the generic reports but does not apply to charges for the custom reports.

When a customer contracts to purchase a generic report and also contracts to purchase a customized report, tax applies to the sale of the generic report regardless that it may be delivered with the custom report as one unit. 9/11/92.

515.0235 **Third Party Furnishing Copies of Records.** A hospital receives a subpoena or authorization letter to furnish copies of records. The hospital sends the subpoena or authorization letter to a copying service and makes its records available, at no charge, to the copying service. The copying service then performs the copying, delivers the copies to the requesting party, and bills the requesting party. Given such facts, tax applies to all charges by the copying service to the requesting party. Since the hospital did not make any charge to the copying service, the copying service cannot make a nontaxable statutory charge pursuant to sections 1158 or 1563 of the Evidence Code, regardless of how such charge is stated to the requesting party. 11/30/88.

515.0238 **Transcription of Public Record.** Generally business records of the Board are public records and sales tax does not apply to sales of copies to the public. It is not required, however, that the form of the records be changed. If for example, a member of the public requests a typed transcript of stenographic notes of a Board meeting, sales tax applies to the sale of the typed transcript because it is not mandatory that the Board prepare a transcript and transfer it to a member of the public. 3/12/86.

515.0239 **Transcripts Furnished by Educational Institutions.** Charges for college transcripts furnished by educational institutions in accordance with a statutory mandate are not ''sale'' transactions, and sales tax does not apply. When copies of documents are furnished by governmental entities in accordance with law, transactions of this type constitute the performance of governmental services

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notwithstanding that the entity furnishing the documents may be entitled to reimbursement for the performance of the service. 12/18/91.

515.0239.500 **Translation of Documents from One Language to Another.** The following covers the application of sales tax to various charges for computer translated documents.

(1) A customer provides documents in one or more foreign languages and requests translations into one or more different languages. The customer is provided with one or more different languages and with one of the following:

(a) A word processed copy on paper, or

(b) An electronic (floppy disk) copy of the translated documents, or

(c) Multiple photocopies or electronic copies of the translated documents.

Tax does not apply to the translation of a foreign language. However, tax applies to the sales of multiple copies.

(2) The customer is provided with a (desktop published or typeset) copy of the translated documents, either on resin-coated paper, film or electronic copy. The customer may use the translated and typeset documents as a retail product, e.g., a book as a user's manual.

If the resin coated paper is used as a reproduction proof and the documents provided contain text only, the charge is nontaxable regardless of the method used to transfer the information to customer. However, output which embodies composed type with artwork is taxable. 12/13/91.

515.0240 **Typing Service.** Charges for hand typing letters, manuscripts or other documents are not taxable. The typist is the consumer of the paper and other materials used in the typing. However, the tax does apply to charges for mimeograph jobs, and it is immaterial that the customer furnishes the materials or that the mimeographer charges by the hour. 11/19/64.

515.0260 **Typing Service—Reproduction Copy.** Charges for typing a perfect copy for a customer are not subject to tax, although the customer will photograph it for purposes of incorporation into a book or pamphlet. 2/24/65.

(c) ORIGINAL MANUSCRIPTS, PLANS, ETC.

515.0300 **Manuscripts.** The transfer to publishers of original manuscripts by the authors thereof for the purpose of the publication is not subject to taxation. However, tax would apply to the sale of mere copies of an author's works or the sale of manuscripts written by other authors where the manuscript itself is of particular value as an item of tangible personal property and the buyer's primary interest is in the physical property. 11/21/68.

515.0320 **Musical Arrangements.** The original manuscript of a musical arrangement is the work product of the arranger and its sale is not subject to tax. However, the preparation of multiple copies is considered the fabrication of personal property rather than the sale of services and the multiple sales would all be taxable. 11/10/64.

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515.0340 **Plans.** A $50 charge for original plans made according to the desires of each person interested in converting existing buses or van trucks into ''house cars'' would not be subject to tax. However, the planner is the consumer of the paper and other materials used to present the plan. The total charge would be subject to tax if the plan sold was merely a duplicate of a plan drawn for a preceding customer. 8/20/69.

515.0360 **Resumes.** Charges for the composition of resumes do not constitute taxable gross receipts. The composer of the resume is regarded as the consumer of the paper and other tangible personal property which is delivered to the client. Additional charges for multiple copies of resumes whether composed by the person or others are taxable gross receipts. 5/4/65.

515.0366 **Writing Original Text.** The writing of original text by a free lance technical writer is a service not subject to tax. It makes no difference whether the original text is transferred to the customer in the form of printed copy or on diskettes. (Regulation 1502.1(a).) However, tax would apply to charges for multiple copies of either the printed copy or diskettes which are transferred to the customer. 12/12/86.

(d) ENGINEERING, DESIGN, RESEARCH AND PRODUCTION

515.0375 **Architectural Drafting.** When a taxpayer prepares drawings for architects, engineers, and other persons based on specifications they have provided, the taxpayer does not perform architectural services. Rather, taxpayer makes sales of tangible personal property which are subject to sales tax. 1/25/94.

515.0380 **Blueprints—In General.** Fees paid to architects or engineers for their ability to design, conceive or dictate ideas, concepts, designs, or specifications are not subject to the tax. Any blueprint provided under the architect's contract or commission are incidental to the architect's services and are not taxable. If after the completion of the contract or commission the architect transfers additional copies of the original blueprint, tax applies to any charge for the additional copies. 12/15/65; 4/25/88.

515.0390 **"Breadboards."** A taxpayer enters into an agreement with a customer to furnish ''breadboards.'' The agreement defines a ''breadboard'' as ''an assembly of MOS devices which together will functionally duplicate a Production Set and will have the performance characteristics specified.''

The agreement expressly provides that the taxpayer will develop two breadboards for which it will receive payment of time and materials specifically devoted to the two breadboards. The customer agrees to furnish engineering, consultation, and the necessary equipment to support the development. The agreement further provides that proprietary rights, patents and indemnities, and the technology used to develop the breadboards shall remain vested in the taxpayer but that the breadboards, upon acceptance, become the sole property of the customer.

The customer is contracting for items of tangible personal property to be developed from predetermined specifications and not for the ideas, data, or

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information relating to the manufacture of the breadboards. The customer is primarily interested in acquiring the breadboards for their intrinsic value as items and not in the purchase of the data, as such, in the course of manufacture. Therefore, the entire sales price of the breadboard models is subject to the tax as the sale of tangible personal property. 7/23/70.

515.0400 **Calibration.** Tax does not apply to charges for calibrating tanks and furnishing written report. 2/13/51.

515.0410 **Calibration.** A company is providing a nontaxable service when calibrating petroleum storage tanks by computing the quantity of liquid in the tank at various levels, if all that the company provides it customer is the information generated by its calibration, even if that information is conveyed by written report. However, if the company transfers any other tangible personal property to its customer, it is making a sale of that property to the customer. Unless that sale is for resale in the regular course of business prior to any use by the customer, the company's entire charge is taxable. For example, if the company performs the calibrations in order to provide its customer with a gauge stick or a tape to be used as a pattern or template, the company's entire charge is taxable with no deduction for any of the calibration services which were required in order to provide the tangible personal property. 2/2/51.

515.0435 **Design and Drafting Plans.** The taxpayer, although not a licensed architect, is permitted by California law to perform certain architectural services. If the services are in the nature of original design, concept, or dictation of ideas, design concepts, or specifications, the fees are not subject to tax. If the services consist of transferring the ideas, designs, and specifications of another person to a tangible form such as a blueprint or design, the charges are taxable. 3/27/91.

515.0438 **Design for Sign.** A taxpayer prepares designs of signs for existing and projected real estate projects. Unless the taxpayer is an architect and prepares the signs incidental to the providing of architectural services, the providing of the designs is not regarded as an exempt service. The true object of the contract is the tangible personal property embodying the design. 10/3/94.

515.0440 **Design Layout—Production Drawings—Production.**

(1) A fee paid to an engineering firm is not taxable where the fee is under a contract for the design and preparation of a general layout for a special purpose piece of machinery based on requirements furnished by the company.

(2) If after (1) above the client has a second engineering firm prepare production drawings, the second firm makes a taxable sale of tangible personal property, i.e., the drawings. But the sale may not be taxable if the second firm, in preparing the production drawings, contributes its engineering knowledge and skill as distinguished from merely converting the layout into a different form of physical property.

(3) If the general layout and the production drawing are prepared by the same firm under a single contract (or simultaneous contracts) and the sale of the production drawing is taxable (2 above) the entire amount paid is taxable. The

amount attributable to the design is part of the expense of producing the production drawing and is not deductible from gross receipts. The principle is the same as in the case of ''preliminary art'' and ''finished art.''

(4) If the same firm does the design layout, production drawing, and produces the machine, the entire sum is taxable. But if the design contract is separable in the sense that there is no contract for the finished machine until after design work is completed, the charge for design work may be excluded. 2/27/64.

515.0445 **Designs For Tee Shirts and Belt Buckles.** A taxpayer prepares designs for tee shirts and belt buckles. The taxpayer sells the designs to persons who manufacture items carrying the designs. The true object of the taxpayer's designs is the tangible personal property which embodies the designs and which the manufacturers use as manufacturing aids to produce the tee shirts or belt buckles. Tax applies to the charge made by the taxpayer. 10/6/94.

515.0448 **Developing Software Program.** A and B enter into a contract whereby A will assist B in developing computerized systems and data bases generally known as an Expert System (system that uses artificial intelligence techniques). Both parties are to provide their expertise and knowledge in their particular field to the venture. All ideas, inventions, hardware, firmware, software or documentation, whether or not protectable by copyright, patents or trade secrets, developed in the performance of the services will be jointly owned.

Under this scenario, the agreement is one for services only and not for services which are a part of the sale or lease of tangible personal property. Of course, if any tangible personal property is transferred by A to B in connection with the performance of this contract, tax would apply to those charges. For example, the contract calls for third party products to be transferred without mark up.

Under a provision of the contract, A will transfer to B a copy of any knowledge base developed. This transfer would take the form of tangible personal property, such as tape, disk, or other magnetic storage media. Such a transfer of storage media would be merely incidental to the performance by A of the service of developing the knowledge base and not a sale of tangible personal property.

It is also possible that an ''Expert System'' developed by A and transferred to B might be considered a computer program as that term is defined in section 6010.9(c). If it is a computer program, rather than data or information, it would nevertheless be a nontaxable custom computer program under section 6010.9, since it would be prepared by A to the special order of B pursuant to the agreement. Thus, A would be considered to be providing the service of developing the custom program, rather than selling the program. 7/21/88.

515.0450 **Developmental Software.** Before a software company, who is in the business of selling software for resale, actually mass produces a product, the company does extensive developing by sending early versions of the software to approximately 2,000 persons at no charge to the recipient. The recipients use the free software and point out any ''bugs'' to the software company.

Tax applies to the sale of the disks, the disk duplicating services and the supporting manuals to the software company. 5/3/93.

SERVICE ENTERPRISES, ETC. (Contd.)

515.0455 **Engineering Charges.** The transfer of tangible personal property such as prototypes, models, etc., produced in connection with a contract for research and development or a contract for product design may or may not be a sale. The decision depends on whether the original data represented by the property could have been conveyed to the client in verbal or written form. If so, the transfer of the property is a sale as it is more than incidental conveyance for the purpose of presenting the data resulting from the contract work. Also see Business Taxes Law Guide Annotations 515.0020 and 515.0660. 8/6/90. (Am. M99–1).

515.0456 **Engineering, Design, etc.** Company A contracts with Company B for Company B to provide certain engineering, design, procurement, and to furnish necessary drawings, specifications, maintenance manuals, and technical support for proper construction, operation, and maintenance for modification of certain equipment. Company B will also provide technical and pricing information for preparation of cost estimates for construction of NOx reduction/control facility. Company B also will be procuring property for Company A.

Drawings, specifications, and other written materials are created and provided by Company B based on engineering and technical expertise. Company B does not supply extra copies of these manuals. The furnishing of the technical drawings is incidentally transferred as part of engineering services and is not a retail sale of tangible personal property.

With respect to the procurement of property, in order to qualify as an agent for Company A in purchasing property and not as a seller of the property to Company A, Company B should have written evidence of agency status, must clearly disclose to the supplier that it acts as an agent for Company A when making the purchases, and the price billed to Company A must be the same amount paid to the supplier.

The contract provides that Company A will pay the actual costs of such property procured by Company B and that the other charges paid by Company A attributable to such procurement would be agency fees. Assuming that Company B discloses to the suppliers that it is acting as an agent for Company A when purchasing the property, Company B is purchasing the property as agent for Company A.

If Company B provides fabrication of tangible personal property, that fabrication would be regarded as a sale and the gross receipts attributable to that sale would be subject to sales tax. 9/19/90.

515.0457 **Engineering Drawings.** Engineering drawings required by a contract for the manufacturing and installation of a custom built pipe organ are considered to be services which are part of the sale of tangible personal property. Accordingly, the receipts from the drawings are includable in taxable gross receipts whether or not they are billed to the church before the organ is produced.

Whether an organ is considered ‘‘machinery and equipment’’ or ‘‘fixtures’’ under Regulation 1521, installation charges are not included in gross receipts. However, any onsite fabrication is subject to tax. 11/16/64.

SERVICE ENTERPRISES, ETC. (Contd.)

515.0458 **Engineering and Reassembly Charges.** An out-of-state manufacturer of ovens used for drying and smoking food products sold and installed an oven for a customer in California. Included in the contract price were separately stated charges for ''engineering,'' which was for the labor of designing the oven to the customer's specifications, and for ''oven labor'', which was for reassembly labor and installation.

The oven is considered to be a fixture. The manufacturer was the retailer of the oven and also a construction contractor. Since there was no local participation in the transaction by any office, salesperson or representative of the manufacturer, the applicable tax due is the use tax, which the manufacturer is required to collect from the purchaser. The charge for engineering (design labor) is a ''service that is part of the sale'' and is includable in the measure of tax. The oven labor (reassembly labor) is not subject to tax if title passed prior to the reassembly and the customer was not required to hire the seller to do the reassembly. In this case, while title may have passed prior to reassembly, there was no evidence to show that the customer could have hired another person to do the reassembly. Accordingly, the charge for reassembly is includable in the measure of tax. 9/27/91.

515.0460 **Exhibits for Expositions and Fairs.** A designer's charges for designing exhibits for expositions and fairs are not subject to tax where the designs are made to display ideas, the designer retains title thereto, and he subsequently contracts under separate agreements to construct and lease exhibits depicted therein. 4/16/70.

515.0470 **Garment Design.** A person creates garment designs by preparing sketches for approval by the customer. Upon approval, patterns and sample garments are produced. The sample garments are used by the customer in preparing production patterns. The production of models or samples which can be used to produce production patterns goes beyond the expression of an idea. The charges are taxable as the sale of a usable product. 1/7/71.

515.0480 **Invention.** The charges for design and engineering services in connection with the development and improvement of an invention are not subject to tax if no tangible end product is required to be delivered under the contract. Tax applies only to the sale of property to be used in rendering the services. However, when the contract requires the delivery of an end product, the charges for the development and engineering services are taxable. 11/4/64.

515.0494 **Land Surveying.** A land surveyor visits the site, measures it with civil engineering tools, and prepares a drawing based on the field work. The client is provided with a copy of the drawing. The land surveyor is providing a service, and the transfer of the copy of the drawing is incidental to the rendition of the service. 11/23/92.

515.0500 **Models.** The building and sale of architectural models pursuant to contracts with architects and designers, which models are used rather than resold, constitutes a taxable sale. 12/30/54.

SERVICE ENTERPRISES, ETC. (Contd.)

515.0520 **Models.** Under a subcontract to design and fabricate a model for a pump and also conduct test and furnish test reports, the furnishing of the tangible personal property (the pump models) constitutes a sale within the meaning of the Sales and Use Tax Law. The amount separately charged for the tests and test reports is not taxable as representing payments for professional engineering services, not part of the production cost of the tangible property transferred. 1/22/65.

515.0540 **Molds.** The full amount of a sale must be included in the taxable gross receipts where the contract of sale involved the sale of boat molds capable of producing a sailboat together with an assignment of the vendor's rights in the design which are subject to royalty payments to the designer. The value of the design rights is presumed to be equivalent to the royalty payments and hence there is no sale of intangible property involved. Also, the various functions performed in developing the boat molds, including design, are costs or services which are part of the sale and hence are taxable. 6/4/64.

515.0560 **Molds.** If a vendor contracts to sell a mold and in order to perform that contract must incur costs for engineering and design, such costs must be included in taxable gross receipts even though separately stated.

If, on the other hand, the vendor merely contracts to do certain engineering and design, without being obligated to deliver a finished product, the charges for such engineering and design are not taxable. 7/19/54.

515.0580 **Package Designing.** The charges for the designing of packages are exempt only when they do not involve the transfer of tangible personal property except as a means of expressing an idea. Whereas the production of a plan or blueprint is necessary for the expression of ideas for package designing, the manufacture of a model which is complete in all respects and capable of use as a pattern in the making of a die goes beyond the exempt expression of ideas, and constitutes a taxable sale of a usable product. 2/9/62.

515.0585 **Packaging Design Transfer.** A taxpayer designed packaging for various types of products. By agreement with its clients, the taxpayer developed and presented to its clients a selection of preliminary package design concepts which were done at the taxpayer's expense and at no cost to the clients. Upon acceptance of the design by the client, the client obtained the exclusive right, title and ownership interest to the design concepts prepared by the taxpayer. At all times it was contemplated the taxpayer would transfer title to the design concepts to the client. The client's true object was the obtaining of the preliminary design package. The transactions were therefore retail sales of tangible personal property. Even if the design package is viewed as preliminary art, tax applies because title to the design packages was passed to the clients. 2/15/95.

515.0592 **Pattern Sizing.** A taxpayer entered into an oral agreement with a dress manufacturer to perform pattern sizing work at his home and was paid on the basis of hours of work expended on each particular job. The work (pattern sizing) involved the grading or transferring of an existing pattern into separate paper

patterns of larger or smaller sizes. The patterns thus created are utilized by the customer as a guide in the process of manufacturing dresses of the size of the particular pattern.

In this case, it is quite apparent that the customer sought the tangible item, the pattern of various sizes, for use in its dress making business. Therefore, the contracts was for the production and delivery of tangible personal property and, thus, the charges for such are subject to sales tax.

Also, taxpayer would not be considered an employee since the essential elements of an employment relationship were not present, i.e., right to control and direct the details of the employee's work performance. The taxpayer performed the work in his home utilizing a sample pattern provided by the customer. This amounted to no more than general direction as to result desired and is not sufficient to establish that an employment relationship existed. 10/28/75. (Am. 2000–1).

515.0620 **Prototype.** A company which agrees to design, develop and qualify a basic prototype unit of equipment for processing onions qualifies as a seller of tangible personal property when it has agreed by contract to sell the prototype whether or not it proves acceptable. However, it is not liable for tax on progress payments or other amounts received under the contract until it becomes a retailer. 6/28/65.

515.0640 **Quality Control.** An engineering service charge for quality control operations by a seller of fluids for oil drilling operations is properly subject to a sales tax as a charge for services that are part of the sales under the gross receipts definition in Section 6012, and is not a charge for installation or application of the fluids. The type of services involved here are so intimately entwined with the sale of the fluids that they must be regarded as part of the sale. 5/21/69; 1/3/91.

515.0660 **Research Contracts.** A research and development contract must be distinguished from a contract for the manufacture of a ''custom made'' item. In the latter, the research, design, etc., although necessary to the manufacture of the item, is incidental to the primary purpose of the contract. Generally, ''custom made'' items are for consumption or resale. The buyer wants the item for its intrinsic value as an item, and is not interested in the data developed in the course of its manufacture. In such contracts, the entire contract price is subject to tax if the tax applies. A person contracting for research and development is primarily contracting for information which is intangible. Generally, the person contracting for information is going to use it to manufacture and sell some item of tangible personal property.

The development of the information in a research and development contract is not a sale of tangible personal property. It is a service. Since the information such as plans, design, parts lists, etc., cannot ordinarily be conveyed orally, the information is conveyed on paper. The transfer of the information on paper is not a sale of tangible personal property, and the transfer is incidental to the service of developing the information. In a few rare instances, the information cannot be conveyed without the transfer of a prototype. In these cases the transfer of the

prototype is incidental to the transfer of the information and is not a sale of the prototype. In most instances the information cannot be developed without the production of a prototype, but the information can be conveyed without it. In these instances, if the prototype is also transferred, it is a sale of the prototype along with a sale of intangible information.

In a true research and development contract, where a prototype is manufactured, the researcher (taxpayer) owes use tax on the materials used to construct the prototype since it was used to compile the data, design, drawings, etc. The measure of the tax is the cost of the materials going into the manufacture of the prototype as well as all other materials consumed.

Thus, if the true research and development contract calls for the researcher to furnish a prototype along with the engineering data, parts lists, design blueprints, operating instructions, etc., the transfer of the prototype (previously used to develop the data called for in the nontaxable service portion of the contract) is a sale of it without any credit for the use tax paid on the materials. The measure is not the full contract price since the primary purpose of the contract was one for the service of developing information. 3/11/66.

515.0680 **Research Contracts.** Contracts for research work which require only the development of ideas, plans, engineering data, etc., do not constitute sales of tangible personal property although models and drawings are furnished to convey such ideas, etc. 8/8/50.

515.0689 **Research and Development-Photocomposition.** A firm has a contract which provides for the processing of magnetic tape copy furnished by its customer and for the photocomposition production materials used in printing. During the early stages of the contract, the firm is involved in research and development of the photocomposition method of reproduction. No use is made of the materials produced during this stage. Later the printed matter is produced using the photocomposition method.

The contract calls for the production of photocomposition of pages to be used in the printing which is billed to the customer at the firm's cost. Tax applies to the full contract price without deduction for the developmental stages during the early part of the contract. 3/7/74.

515.0700 **Scientific Drawings.** A contract to purchase scientific drawings and sketches is not a contract for research and development, but a contract to purchase a specific physical item of tangible personal property and is taxable as such. Since the information has already been developed and put on paper, the purchase of the drawings differs from research and development contracts. A research and development contract is primarily for the service of developing the information. The ultimate recording of the information on paper under such contracts is incidental to the purchase of the service to develop the information. 3/9/66.

515.0710 **Seismic Calculations.** Sales tax applies to charges made to a California customer for seismic calculations made as a condition of sale of industrial valves, since the activity is a service provided as part of the sale of tangible personal property. 7/22/77.

SERVICE ENTERPRISES, ETC. (Contd.)

515.0720 **Separate Purchase Orders.** When a contract to manufacture certain equipment is followed by two purchase orders, one for the equipment and the other for designs and drawings necessary to manufacture the equipment the full contract price must be included in gross receipts. The test is whether at the time of performing the engineering and design the person doing the work is under any obligation to deliver an end product. If he is, then the cost of engineering and design is not deductible from gross receipts. If he has no contract for an end product but is simply performing an engineering service not involving the production of any tangible personal property which is desired by the customer, then such charges can be regarded as service charges and not subject to tax. 1/22/58.

515.0725 **Software Prototypes.** A computer consulting business also creates custom software. It is contemplating a contract to develop and install a system in a foreign country for a foreign entity. A prototype will be fabricated and assembled in this state to serve as a model or a ''test-bed'' for the larger system which will be assembled and developed in the foreign country. The prototype will be used to perform such tasks as hardware and software integration and system problem correction. On completion of the contract, the prototype will be shipped to the customer. Title to the prototype will transfer to the customer upon delivery to the common carrier for shipment.

The prototype is clearly ''tangible personal property'' as defined in Section 6016. The use of the prototype in this state to integrate hardware and software and to correct system problems is other than for demonstration and display for the purpose of resale. The sale to the computer consulting business of the materials and labor to fabricate or assemble the prototype is a taxable retail sale. The sale to the customer is a second retail sale, but that sale will be exempt from tax if meeting the requirements of subdivision (a)(3) of Regulation 1620. 5/3/93.

515.0740 **Structural Steel Detailers.** When construction plans prepared by an architect or engineer are incomplete as to structural details, the steel contractor engages a person in the business of steel detailing to furnish the missing details in the form of detailed plans. The details usually pertain to the type of connections to be used in assembling the steel structure, i.e., whether particular steel members will be welded, bolted or riveted together. The steel detailer does not merely produce a drawing from information and data furnished to him but rather he exercises his own independent judgment in conceiving and dictating his own ideas and designs. Accordingly, steel detailers are consumers of tangible personal property which they utilize in rendering such service and not retailers. 12/20/67.

515.0755 **Technology Transfer.** A firm enters into a contract to purchase certain tangible personal property together with the right to reproduce the property and incorporate the reproduction into integrated circuits which it will sell. The contract also provides for 80 hours of consultation and a requirement that each product produced by the firm contain a copyright notice. The contract calls for payment of a lump sum plus royalties based on the number of units produced.

SERVICE ENTERPRISES, ETC. (Contd.)

The contract is for a ''technology transfer''. The measure of tax is limited to the value of the tangible personal property separate from the license to manufacture and sell. The sales price of the tangible personal property is the cost of material, fabrication labor and suitable mark up. 12/15/92.

515.0760 **Temporary Tooling.** A vendor who contracts to design and construct a piece of temporary tooling to be analyzed by the customer before he places an order for a permanent model is performing engineering and design services and is the consumer of materials used in constructing the tooling. 11/10/65.

(e) MISCELLANEOUS ACTIVITIES

515.0775 **Biographical Information Resumés.** A taxpayer operates an international ''matchmaking'' service. The taxpayer provides information on single Russian, Ukrainian and other Commonwealth of Independent State (CIS) women, who desire to immigrate to the U.S.A. and marry single American men who also wish to marry. The taxpayer does not charge the female clients in the CIS to sign up with the taxpayer's service. They complete an application and provide at least one photograph of themselves. The taxpayer transfers (after translation) their biographical information onto a standard resumé form.

The taxpayer prepares single information sets which include one resumé (with picture) and corresponding addresses of the single women. Other portfolios will contain 10 or 20 resumés rather than one resumé. The selling price increases with the number of resumés in the portfolios.

Under this scenario, if the taxpayer's operations consist merely of the selling of resumés and pictures with no significant match making services, sales tax applies to the entire gross receipts from the sale of such material. However, if the taxpayer is selling a service where it provides its customers with input, advice, or assistance in the selection of potential mates from the CIS as opposed to simply selling pictures and resumés of CIS women who are selected solely by customers after they browse through resume books, the taxpayer is providing a nontaxable service. The taxpayer is regarded as the consumer of the tangible personal property delivered to the customer and sales or use tax applies to the purchase price of the property to the taxpayer. 6/15/95.

515.0780 **Business Advisory, Record Keeping, Payroll and Tax Service.** A firm which performs business advisory, record keeping, payroll and tax services for small businesses and furnishes form, binders, and other property to franchised consultants for distribution to subscribers as an incident to the rendition of its services is the consumer of such tangible personal property used in the rendition of its services. Accordingly, it is subject to tax measured by its cost of such property. 7/29/65.

515.0790 **Carbon Dioxide.** When a taxpayer employs its equipment at customers' sites to apply carbon dioxide to fresh fruits and vegetables to preserve them during transportation to market, it is providing a service rather than leasing

the equipment to the customer. The charges made by the taxpayer are based on the amount of produce shipped using its process and not by the equipment or property used. 3/14/95.

515.0800 **Cards or Letters.** Cards or letters furnished to club members giving personality information for a lump sum amount not related to the number of cards or letters furnished, is regarded as a service enterprise. 4/1/50.

515.0820 **Cataloging Services.** Charges for the production of printed catalogs for libraries are taxable except supplements regularly issued every three months or more often which are within the periodical exemption. Where a lump-sum charge is made for catalogs and supplements, an allocation should be made as between taxable volumes not issued with the necessary frequency and the supplements which are so issued. Charges for services of cataloging books for libraries, if not a condition to the production of the printed catalogs are not receipts from sales of tangible personal property, but for services and are not taxable. (Effective July 15, 1991, the sale of newspapers and periodicals, including sales by third party retailers, is subject to tax unless otherwise exempt. However, effective November 1, 1992, tax does not apply to the sales or use of a periodical, including a newspaper, which appears at least four, but not more than 60 times each year, which is sold by subscription, and which is delivered by mail or common carrier. 1/19/65.

515.0830 **Charges for Client Bills and Management Reports.** Charges for generating client bills from customer furnished time sheets and for providing management reports are charges for nontaxable services under Regulation 1502 (c)(5). 2/28/89.

515.0842 **Closed Captions for Hearing Impaired.** The application of tax to closed captions created for television programs for the benefit of the hearing impaired viewers nationwide is as follows:

(1) Captioning

Captioning activity is considered a service transaction even though the results of the service activity may be recorded in a machine-readable form and transferred to the client or encoding house on a captioning disk or an encoding disk. The caption editor is required to use language skills to address the needs of the hearing impaired while considering the nature of the program. What is paid for is not putting the symbols on the disk, but the service creating the words and symbols.

(2) Reformatting

Reformatting is editing or altering material previously captioned to match a new version of the program. It is a service activity not subject to tax.

(3) Encoding—Outside

Encoding is the process of integrating captions with the program owner's master tape. This is usually done by someone other than the firm that created the caption. Charges for encoding are nontaxable when such services are in connection with the production of a qualified motion picture. 12/19/88.

SERVICE ENTERPRISES, ETC. (Contd.)

515.0880 **Codification and Publication of Ordinances.** The codification and publication of municipal ordinances for subsequent sale, constitutes the sale of tangible personal property, the gross receipts therefrom being subject to tax. 12/2/55.

515.0900 **Codification and Publication of Ordinances.** The total charge for codifying city and county ordinances, which includes the editorial work and publishing of 50 copies and loose leaf binders, is taxable. 7/3/68.

515.0920 **Color Consulting.** The mere giving of advice or instruction with regard to color schemes where no drawings or pictures are furnished is not subject to sales tax. 8/12/60.

515.0940 **Community Antenna.** A one-time fee charged to subscribers for installing an antenna, title remaining in the installer, and a monthly fee charged for providing signals, are nontaxable. 8/23/66.

515.0950 **Computer Data Bases.** A client contacts the taxpayer with the medical name of the client's ailment. The client commonly questions a diagnosis their doctor has given. The taxpayer researches the most current medical information on the ailment in a computer data base and sends the client a computer printout discussing the ailment. The charge for such research and computer printout is for a nontaxable service. The true object of the transaction is medical diagnosis. The computer printout is the means to transmit the product of the service and is only incidental to providing the service of medical research and diagnosis. The charges for such a service are not subject to tax. 7/26/88.

515.0952 **Computer Services.** A person operates an on-line service for the buying and selling of consulting services, software and information. The ''service'' links information sellers with the information buyers through the seller's and buyer's personal computers and a host computer system maintained in California. The ''service's'' contact with this state consists primarily of mailings, advertisements in magazines and telephone connections. Periodic appearances may be made at conventions, trade shows and user's group meetings where free access and demonstration software may be given away.

Both buyers and sellers access the system using their own computers and a modem. Information is delivered electronically over the telephone line without the transfer of tangible personal property. The ''service'' provides a forum for the buyer and seller to meet. The ''service'' derives its revenue by charging transaction fees, connection charges, one-time new account sign-up fees, monthly service fees and storage fees. The ''service'' also is involved in collecting from the buyer and paying the seller.

The activities of the ''service'' qualify the ''service'' as a retailer, by maintaining the host computer in California, the ''service'' occupies a ''place of business in this state,'' section 6203.

The ''seller's'' charges for (1) consulting services sent electronically through the computer, (2) prewritten text sold electronically through the computer, and (3) other information, such as computer software graphics, sound and template,

are not subject to tax provided that no tangible personal property is sent to the buyer. In addition, tax does not apply to the transfer of information by electronic telecommunications from a remote location, if there is no tangible personal property sent to the buyer. If the person described as the ''seller'' sends a hard copy of information to the buyer, the entire charge would be subject to sales or use tax.

Depending on the facts of the transaction, the person operating the service may well be the retailer responsible for payment of any sales tax or collection of any use tax on the transaction. 12/9/92.

515.0953 **Court Reporting Services—Depositions and Litigation.** In general a contract to report and transcribe an oral proceeding is a contract to perform a service and the tax does not apply. However, tax applies to sales of printed matter and thus tax applies where a single copy of a transcript is furnished and no services are performed (unless the transcript is furnished pursuant to Code of Civil Procedure, Section 2019) or where multiple copies of transcripts are furnished to the customer pursuant to a contract for recording and transcribing an oral proceeding. Tax also applies to additional copies furnished beyond the first copy to the parties involved in the litigation. 4/11/79.

515.0954 **Credit Rating Reports.** The tax treatment of credit rating reports depends on the contract between the parties, how the report is marketed, and other factors. It must be determined on a transaction by transaction basis. If a customer makes a request for a report on a specific person or entity, the transaction most likely will be treated as a library search and, therefore, is a nontaxable service. However, if the credit rating business sells standardized reports to more than one customer or markets such reports to the public or to a specific segment of the public, even if there is only one purchaser, the credit rating business is making taxable sales of tangible personal property. 7/1/92.

515.0955 **Crop-dusting.** Crop-dusting does not qualify as a common carrier flight. Although the aircraft carries the dusting material from the loading point to the location of the fields, such a flight is not regarded as a flight for the purpose of transporting property for compensation. Rather the flight is regarded as an agricultural service of crop-dusting. 5/14/91.

515.0965 **Custom Computerized Reports.** A nontaxable research service charge is made by a person who receives raw scholarship data from a customer, enters that information into a computer database which already contains scholarship data, and then prepares a customized computer generated report containing such combined data which is delivered to the customer for consideration. 8/20/93.

515.0970 **Custom Market Studies.** Custom market studies contracted for in advance with a particular radio or television station, or others such as advertisers, are nontaxable. This is the performance of a service. The contract price includes the charge for compiling the data. 3/20/92.

SERVICE ENTERPRISES, ETC. (Contd.)

515.0973 **Diet Analysis Reports.** Taxpayer prepares individualized diet analysis reports from information submitted by persons in response to a questionnaire requested from the taxpayer. A computer analysis of the dietary information is prepared and bound and returned to the customer, along with a specified number of pamphlets on nutrition. Additional pamphlets are available for a fee. A $2.00 charge is made for postage and handling on the shipment of the analysis report and pamphlets.

The analysis of the dietary information is an exempt service resulting in a report based on customer furnished information even though some tangible personal property is incidentally transferred. The pamphlets furnished with the report are sold and are subject to tax unless exempted for some other reason such as sales in interstate commerce. The measure of tax for these pamphlets is the same for additional pamphlets ordered separately. The postage and handling charge is exempt to the extent of the actual cost of postage, separately stated on the sales document, and the portion of the handling charge pertaining to the report, provided the records support the portion claimed as exempt. 4/3/91.

515.0975 **Diet Counseling Service.** The franchiser of a diet counseling clinic, charges its franchisees a ‘‘gross daily license fee’’ per customer. For this fee, the franchisee receives a daily packet of eight supplement capsules which is provided to each customer as part of the diet counseling services. The franchisee also resells the daily packets to other sub-franchisees for their customers. In addition, the franchisee also purchases manuals, video instructional programs and business cards for resale to counselors and other diet center operators.

The franchisee is the consumer of the daily packets provided as part of their diet counseling services, which is provided for a lump sum. The daily packets are only incidentally provided as part of the diet counseling services and is not an item sought as a ‘‘true object’’ of the contract. As the franchiser does not make a separate charge for the daily packets, a portion of the gross daily license fee is allocable as the cost of the daily packets, and is subject to tax.

Tax is also due on the retail selling price of the manuals, video instructional programs, business cards and the daily packets that are sold to other counselors, other diet center operators or sub-franchisees. 3/22/90.

515.0976 **Dog Shows.** Persons who serve as superintendents of America Kennel Club sanctioned dog shows are engaged in a service enterprise pursuant to Regulation 1501. They are consumers of all materials (including catalogs) furnished incidentally to the organizing and conducting of the shows. 11/16/83.

515.0978 **Event Producer.** A company produces events for its clients such as employee meetings held to introduce new products or corporate messages, or to reward employees for performance. The meetings (or shows) range in audience size from twenty five to one thousand attendees. The company’s internal staff of producers create and produce these shows using freelance artists and other vendors. The company’s involvement is total from initial concept to final execution. A typical show is set up in a hotel ballroom or other suitable location, and uses rented equipment for which the company contracts and pays for. Set ups

are temporary and labor contracted for by the company is used. When the show is over, the rented equipment is returned and sets are either destroyed or returned to the rental facilities. No part of the show remains or is given to the client after the performance. The company does not transfer possession of the tangible personal property to its clients either before, during, or after the event.

Since the client does not take possession of the property, the company is performing a service and is the consumer of all tangible personal property it uses to produce the events. Thus, sales or use tax applies to the sale or rental of the property to the company. 7/3/95.

515.0985 **Face Painting.** Painting faces for kids at fairs and parties does not constitute a sale of tangible personal property, but rather a performance of a personal service. Painting faces is like painting fingernails. Sales tax does not apply to such services. The face painter is the consumer of paints and other supplies. 2/18/94.

515.0990 **Fireworks Displays.** A charge for furnishing a fireworks display is not subject to sales tax when the fireworks company retains title to and possession of the fireworks and employees of the company explode the fireworks. In such case, the fireworks company performs a service and is the consumer of the fireworks so furnished. 10/7/81.

515.1000 **Floats.** A decorating company contracts to build a float and enter, display, and operate that float in a parade. The contract does not pass title to the float to the customer, nor does the company transfer possession of the float to the customer. The company is the consumer of the material which becomes part of the float. If the company thereafter contracts to sell the float (whether to its original customer or to another person), tax applies to the gross receipts from that sale. 10/21/54.

515.1010 **Foreclosure Listing Service.** A taxpayer accumulates Notice of Default, Notices of Trustees Sales, Notices of Trustees Deed, and federal and state tax liens from the County Recorder's offices. Taxpayer also links information obtained from the County Assessor's offices to the information obtained from the County Recorder's office. The information obtained from the County Assessor's offices includes the date that property was sold, selling price, assessed value and square footage.

The taxpayer's subscribers receive a foreclosure listing in a standardized format, i.e., Notices of Default in one county for $49.95 per month or a subscriber may choose to receive the same information for several counties for $519.95 per month. In addition, a subscriber may specifically request ''custom specialty listings'' for particular information other than the standardized reports. For example, a subscriber may request all foreclosures in a particular city during a particular period of time on single family residence with square footage between 2,000 and 2,500 square feet. Each subscriber has the option to receive any of the foreclosure listing through electronic transmission on a daily basis or through the United States mail on daily or weekly basis.

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Where the taxpayers subscribers receive foreclosure listing through electronic transmission and do not obtain possession of any tangible personal property, such transactions are not subject to sales tax. With respect to foreclosure listing delivered through the mail which are custom specialty listing based on the subscribers special request for particular information, the taxpayer is performing information research which is a nontaxable service.

However, tax applies to the subscription fees charged for standardized reports delivered through the mail. The taxpayer in this instance is selling information in the form of tangible personal property. The real object sought by the subscriber is the report (foreclosure listings) itself which have intrinsic value due to the information contained. Subscribers are not purchasing the taxpayer's services per se; instead, they are purchasing the reports produces by the service. 7/17/96.

515.1020 **Fuel (Nuclear) Service Contract.** Taxpayer is consumer of tangible personal property used in performing fuel service contract where fuel (uranium dioxide) is owned by AEC and is leased to taxpayer's customer by AEC and taxpayer converts fuel from the form received from AEC into uranium dioxide, and thence through various manufacturing steps to permitthe fuel to be used in customer's reactor, and also furnishes the technical, financial and management services, together with the handling of the fuel at the customer's plant. 3/4/70; 3/24/70.

515.1060 **High-Energy Irradiation.** A radiation facility produces high-energy pulses of radiation to which the facility's clients subject their property for purposes of testing and experimentation. The facility furnishes operators, technical advice and equipment for observing and recording radiation effects. The operation of the facility is a nontaxable service, and the irradiating of the clients' products does not constitute taxable processing. 10/17/66.

515.1150 **Indexing Written Manuscript.** A person was hired to create a book index. The contract required the person to review the written manuscript and index each occurrence of the relevant terms and phrases found within the manuscript by noting the page numbers. The completed index was returned to the publisher on a computer disk. Indexing is generally regarded as a service even though the completed index is transferred to the purchaser on a tangible medium. Accordingly all charges in connection with indexing, such as management fees and messenger services are not subject to tax. 1/22/93.

515.1160 **Intelligence Testing.** An organization whose business is providing aptitude tests carried out by providing schools with test booklets and answer sheets which are returned to the organization, marked, and the answer sheets only returned to the schools, renders a service and the booklets and answers sheets are tangible personal property consumed in performing this service, and the organization is subject to the use tax measured by the cost of these materials. 6/3/60.

515.1167 **International Driving Permits.** A California automobile insurance firm acquired blank international driving permits from the out-of-state office of

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an automobile association. The out-of-state automobile association, pursuant to the agreement with the United States Department of State and in accordance with international conventions, furnished the California automobile insurance firm blank serially numbered driver's permits. The California firm paid $2.00 for each permit. The out-of-state automobile association is required to keep records of the serial numbers of the permits issued. When the United Sates or foreign governments request information about an individual to whom a permit was issued, the association complies with the request by linking the serial numbers to a specific application. The Department of State is empowered to issue the permits or delegate the function to another party. The function has been delegated to the automobile association and is the only source of the permit form.

Under this scenario, the California automobile insurance firm is performing a nontaxable service when it issues a permit to an individual motorist for the authorized $5.00 fee. As to its acquisition of the blank permits from the out-of-state automobile association, the relationship between the two is also predominately a service agreement and not a sales agreement. Therefore, the California firm's acquisition of the serially numbered blank permits for $2.00 each is also not subject to tax. 6/23/88.

515.1177 **"Legend" Drugs.** "Legend" drugs (drugs having obvious potential for human harm) can legally be dispensed only by licensed veterinarians and only after examination of animals. They are therefore regarded as consumed by veterinarians rather than sold by veterinarians. 8/3/94.

515.1178 **Letter from Santa.** A taxpayer anticipates offering a "letter from Santa" which will be a personalized letter sent to individual children. The taxpayer will write a form letter and use word processing equipment or a typewriter to set up the basic form. When the purchaser orders a letter, he or she will provide the taxpayer with facts which are unique to each child. The taxpayer will insert the new information, such as the child's name, into the appropriate spaces in the letter. Through this process the taxpayer will modify the form letter and create each child's personalized letter from Santa.

Under Regulation 1502.1(a), tax applies to charges for producing multiple copies of letters using word processing equipment. Multiple copies include form letters produced with a slight variation which personalizes essentially the same letter. Thus, sales tax would apply to the taxpayer's entire gross receipts from the sale of each letter. 12/7/95.

515.1180 **Library Services.** The application of classification labels, card pockets and a college name stamped in the book, are not tax exempt professional library services. They are mechanical processing included within the definition of sale in Section 6006(b) of the Sales and Use Tax Law and are subject to tax as part of the gross receipts. However, the following are tax exempt professional library services:

a. Bibliographical description of the book for classification purposes.

b. Assignment of, or verification of, the Library of Congress classification number to each book.

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c. Inspection and verification of book card, pocket label and Library of Congress catalogue cards.

Records of receipts from taxable and nontaxable portions of contracts must be segregated in order to claim a deduction from gross receipts for nontaxable portions. 12/4/64.

515.1181 **License To Manufacture and Sell.** A domestic corporation and a foreign corporation each have developed proprietary products. Both corporations desire to have an alternate source supplier for their products. The two corporations entered into an agreement whereby they license each other to manufacture and sell each other's products in exchange for seven percent and four percent royalties. In connection with this agreement, technical information in human readable form is transmitted electronically between the parties.

There is no transfer of tangible personal property in this transaction and neither sales nor use tax applies. 7/11/85.

515.1181.300 **Medical Monitoring Service.** A taxpayer provides an emergency response system to the customer. The service consists of an easy to use electronic device designed to signal a friend, relative, or emergency service whenever help is needed.

The taxpayer buys or leases these units from the company who does the monitoring from a center located out of state. The taxpayer bills customers separately stated amounts for rental and monitoring of the equipment. The taxpayer, in turn, pays the monitoring company for the purchase or lease of the equipment and the monitoring of all units in service.

The taxpayer acknowledges that the monthly fee charged to its customers for the equipment rental is subject to tax. The only question is whether the monthly fee for monitoring the equipment is subject to tax. The operation of the monitoring service is explained as follows. When a customer presses the button on the portable transmitter installed in the customer's home, it sends a radio signal to the receiver, which then dials the central monitoring system located out of state. The center then notifies one of the three emergency contacts designated by the customer at the time of installation of the unit. There is no charge for the number of times the system is used by the customer. Based on this unique situation presented by specific facts provided, the monthly fee for monitoring the unit is regarded as a nontaxable charge for services. Thus, the contract between the taxpayer and its customer is for both the lease (sale) of tangible personal property and the provision of services. In other words, the monthly fee for monitoring the equipment is not subject to tax. 7/15/96.

515.1182 **Membership Fees.** A taxpayer, for an annual membership fee of $500 plus a one-time administrative fee of $150, provides member access to a wide range of nontaxable services and the member is entitled to "specially priced products" from business consultants who are unrelated to the taxpayer (i.e., the taxpayer does not receive commission or other compensation with respect to sales made by the business consultants). The taxpayer also provides its members canned software which has a retail value of $179, but cost the taxpayer $49.

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The software is not provided to each member because it is only beneficial to some of the members. No adjustment in fees is made if the software is not provided. Members also receive the following items which are tangible personal property: 1) a Business Health Index Survey, 2) a Solution Report, 3) a Business Expense Audit, and 4) a quarterly Newsletter.

The value of the tangible personal property provided the members, including the canned software, appears to be minimal in relation to the services provided. It also appears that members join for access to professional services. Based on the facts, the membership fees are not considered taxable and the taxpayer is the consumer of all of the tangible personal property provided to the members. Accordingly, the firm is the consumer of property which it furnishes. 1/27/94.

515.1183 **Monitoring Contracts.** Company A contracts, usually with state or federal courts, to monitor offenders. Although tangible personal property is required to accomplish the purpose of the contract, the service component of the contract is significant. Although it is not clear what is provided, it is assumed that Company A provides the contracting agencies with reports, including telephone and written reports. If these reports are the only tangible personal property transferred, they would be regarded as transferred incidental to the providing of service. Company A uses certain equipment to accomplish these contracts which is a use of that property by Company A. The charge by company A to the contracting agencies is not subject to sales or use tax.

Company A also contracts with Company B to provide certain products and services. Company B provides a radio frequency transmitter which is, in effect, an ankle bracelet that attaches to the offender and a field monitoring device that is installed at the offender's home and is plugged into a telephone jack and power line. Company B also provides a host computer system located at Company B's office. Company B also provides sufficient field equipment supplies for up to four installations per year per unit. Supplies in excess of this amount are provided for an additional, separate charge. Field equipment units in Company A's inventory which are in excess of those needed for five working days, which excess units are pursuant to Company A's request (requested spares), are considered billable units. The primary portion of this contract is a service contract with an incidental transfer of tangible personal property.

Company B also provides to Company A sufficient field equipment supplies, such as batteries, latches, and straps for Company A to perform up to four installations per year per unit. These supplies are also transferred incidental to the monitoring service. Company B is the consumer of this property. With respect to the requested spares, Company A chooses to lease tangible personal property from Company B in order to conduct its business in the way it chooses. Assuming Company B has not paid sales tax reimbursement or use tax on the requested spares, Company A owes use tax measured by the rentals payable for these leases. With respect to any additional field supplies or any other tangible personal property provided by Company B, which is not leased, it owes use tax measured by the purchase price. 6/30/92.

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515.1184 **Multiclient Research Reports.** A taxpayer undertakes a research project after it determines the marketability of the reports. When there appears to be sufficient interest, the taxpayer will complete the research and produce a report of its findings. A customer can purchase the final report (five copies) and also the same number of copies of any ''follow-up'' reports when they are issued.

Under this scenario, the real object sought by each buyer is the report itself, which has an intrinsic value due to the information it contains. The taxpayer is not performing multiclient studies in which client's agree to fund the project's cost. Instead, the taxpayer sells reports, based on unfunded or speculative research, to all interested persons. In addition, both the primary reports and follow-up reports are more like books, complete in themselves, rather than separate issues of a related publication. Therefore, the taxpayer is a seller of printed matter and tax applies to the total amount charged for the reports. 3/29/84.

515.1185 **Multiple Listing Service Books.** The real estate multiple listing services maintain listings on a computer data base which may be accessed via modem by the participants. The listings are also printed in book form. Many of the multiple listing services contract with outside vendors who both maintain the computer data base of listings and print the data base in a book format. These vendors charge input or insertion fees for each listing entered into the data base as fees for the multiple listing service books they print.

If the vendor's charge for an insert or for input into the data base is optional—that is, the vendor does not require the purchase of the service as part of the sale of the books—the charge for the data insert or input is not subject to sales tax. 4/13/92.

515.1200 **Oil Well Testing.** A firm engaged in the business of testing and processing oil wells, which purchases nitrogen gas and injects it into oil wells for use as a medium for building up pressure in the well, the gas being dispelled as it is used, is the consumer of the gas, although the oil well operator is billed on the basis of the number of cubic feet of gas used. 8/4/64.

515.1210 **Optional Inspection Fees.** A charge for an optional inspection conducted after the sale of the item inspected, is not a service that is part of the sale within the meaning of Section 6012(b)(1). Thus, such charges should be excluded from the measure of gross receipts which are subject to tax. 5/9/91.

515.1220 **Patent Draftsmen.** The work of patent draftsmen represents essentially the performance of services rather than the selling of tangible personal property, and hence, is exempt from tax. 5/26/55.

515.1240 **Preparation of Income Tax Returns.** Sales tax does not apply to charges for the computerized preparation of tax returns when the computer operation includes the evaluation and development of certain factual information, supplied by the customer, into completed federal and state income tax returns. A company which prepares such computerized returns is the consumer of the three copies of the completed returns which are furnished the customer. 1/17/67.

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515.1252 **Pre-Screen Credit Service.** A firm evaluates persons for credit for clients by using data in an existing data base. The following steps are involved:

(1) Selection of a demographically based list of possible credit candidates.

(2) The firm and the client develop a set of appropriate credit criteria.

(3) A list of potential candidates is sent to the firm by the client.

(4) The firm prepares an individualized computer program and evaluates the names based upon the credit criteria developed in (2) above.

(5) A list of those who meet the criteria is developed.

(6) The list is sent to the client or its designee for use in solicitation.

In developing a list, two magnetic tapes are prepared: one with those persons who meet the credit criteria and one which contains the names of the persons who did not meet the credit criteria.

The transfer of the magnetic tape to the client is incidental to the service performed by the firm. Tax applies to the sale of the tape to the firm and the charge to the client is a nontaxable service. This is because the firm extracted information from an existing data base to the special order of its client and did not merely repeatedly sell data base information. 4/20/88; 7/26/94.

515.1260 **Press Clipping Bureau** The contract between a Public Clipping Bureau and their subscribers constitutes a contract for a service, not a sale of the clippings, even though charges are based on the number of clippings provided. 7/27/51.

515.1280. **Processing of Human Tissue.** The processing and mounting of a specimen of human tissue on a diagnostic slide does not result in the creation of tangible personal property where performed as an integral step in the process of diagnosis of human illness. However, the production of a completed microscopic slide to be used for educational purposes is a sale of tangible personal property even though a specimen of human tissue is made a part of the slide. 8/30/71.

515.1295 **Oil Well Drilling Reports.** A taxpayer is in the business of gathering data on oil well drilling from clients, public records, and other sources. It has contracts with various clients to provide various reports which are different in the service and data provided. Each type of report is under a separate contract. Generally, clients subscribing to a specific report pay an underwriting fee (initial fee) plus monthly or annual fees to support the data base from which the reports or data are furnished to clients. The taxpayer will not establish a contract unless a specific number of participants (clients) are involved. All clients to a contract receive the same report or information.

A participant is not paying the taxpayer to process the participant's data. Rather, a participant is paying the taxpayer for standardized, common reports which are issued to all participants of a contract at stated intervals. It is reasonable to assume that the price paid under a single contract for a particular set of reports does not cover all of the taxpayer's costs. It is only by marketing and selling the reports to several persons that these costs can be recovered. Thus, the taxpayer is

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selling data in the form of tangible personal property and, therefore, its initiation fees and monthly/annual charges are taxable.

This contract is distinguished from a service contract in which all of the following factors are present:

(1) There is only one contract for a particular report, document, or other written material, though one or more persons who want the report, etc., may be parties to a single contract.

(2) The parties enter into the contract before the report, document, or other written material is produced.

(3) Either the customer specifies which information is to be gathered and included in the report document, or other written material, or the information included in the report, etc., is based upon specific information from, or needs of, that customer

(4) The report etc., transferred is unique and is not marketed to other persons. ''Unique'' means that no one else who contracts separately with the provider of the report receives an identical or almost identical report, document, or other written material. Transfers of standardized or ''canned'' reports which are available to more than one person under separate contracts are sales of tangible personal property.

(5) The contract price covers the full cost of performing the service, i.e., the costs of gathering and compiling the data, plus a reasonable share of the overhead of the person providing the report, document, or other written material.

In cases of this type, the Board has considered the contract as a contract for services with an incidental transfer of tangible personal property. 2/2/93.

515.1300 **Processing of Fruits and Vegetables for Shipment.** A company provides gaseous atmosphere to shippers for the preservation of fruits and vegetables during transportation to market. The process called ''Tectrol'' consists of replacing the air from freight cars and highway trailers with certain gases and sealing the fruits and vegetables within vinyl plastic envelopes. The company is engaged in a service enterprise and is, therefore, the consumer of the gases and plastic envelope materials, the costs of which are subject to sales or use tax. 6/1/67.

515.1303 **Satellite Television Services.** The providing of satellite television services is not subject to sales or use tax. Tax may apply to the sale or use of the equipment used in furnishing such services. 11/15/94.

515.1307 **Snow Manufacture.** The manufacture of artificial snow at the customer's site is a sale of tangible personal property subject to sales tax. The true object desired by the customer is the snow rather than the service of making the snow. Items incorporated into the snow and sold in the form of snow may be purchased for resale. 9/15/92.

515.1310 **Specialty Type Products and Industry Wide Market Data.** Specialty type products and industry wide market data, including general reports on various industry segments, standard micro-computer programs, and

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data are all taxable when delivered as tangible media. When any of these products are delivered electronically, they are exempt, because there has been no transfer of tangible personal property. 3/20/92.

515.1314 **Sportag, Tag-Along, and Identag System.** ''Sportag'' is a lightweight durable plastic tag worn on a person's shoelace and contains a phone number and identification number. By making a collect call to Sportag, immediate identification and a list of allergies and special medical conditions will be given to the rescuing party. The initial fee is $10.00, renewable annually for $7.00.

Tag-Along is an identification tag for children and Identag is an identification system for items such as car keys, briefcases, etc. The identification system for Tag-Along and Identag work along the same lines as Sportag. The price for one tag is 49 cents and one tag is included with each sale.

Under this scenario, the Sportag, Tag-Along, and Identag systems are services with incidental transfer of tangible personal property. Thus, the taxpayer is the consumer of the tags. As the consumer of the tags, sales or use tax applies to the purchase price of the tags to the taxpayer. 10/19/84.

515.1320 **Swimming Pool Service.** A swimming pool service is the consumer of water treatment chemicals used in the performance of the service for a monthly charge. 7/18/57.

515.1330 **Tariff Bureau Operations.** A tariff bureau is in the business of providing specialized services for certain carriers whose operations are regulated by the Interstate Commerce Commission or the Public Utilities Commission. The clients appoint the bureau as their true and lawful attorney and agent to gain approval, publish, and file freight tariffs and supplements with the regulatory agencies. The services fall under two general categories.

The first occurs prior to the time a new tariff or a change to an existing tariff is proposed. The bureau may perform research to determine if the proposed tariffs interfere with the existing tariff of any carrier, consult with the client to determine rates and their impact on the industry, and consult with the client as to the competitive impact of the rates.

The second occurs after approval of the tariffs by the agencies when the bureau will compile the text of the tariff and rules for printing, footnote tariff authorities, and print the tariffs.

The work performed prior to approval of the freight rates comprise of acts performed as an agent of the carrier and such services are not subject to tax. However, an appropriate breakdown of such charges should be made to the customer. The work performed after approval is in the nature of services in connection with the production and printing of the tariffs and is taxable. 12/30/71; 7/10/96.

515.1338 **Telephone Debit Cards.** Telephone debit cards are sold in increments of $10.00, $20.00, or $50.00 and entitle the purchaser to make long distance telephone calls at a flat rate per minute until the card is fully used or expires.

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The true object of the transfer of the card is the future telephone service. The card is incidental to the telephone services. Accordingly, the sale of the telephone debit cards is a service and not subject to sales tax when transferred to the purchaser. However, providers of a service are the consumers of material and supplies used in connection with the service. When debit cards, or the material from which they are made, are purchased by the seller of the cards, applicable sales or use tax will be incurred. 6/16/93.

515.1339 **Telephone Debit Cards—Resale.** A person who transfers a debit card with telephone services does not make a ''sale'' of tangible personal property for the purposes of the Sales and Use Tax Law. A debit card, as used here, is a symbol or ''token'' of the telephone service provided. A person who transfers a debit card associated with the telephone time makes a nontaxable transfer because the ''true object of the transfer of the card is the future telephone service.'' (See annotation 515.1338 (6/16/93)). The application of tax is the same whether the person to whom the transfer is made will use the telephone service or will, in time, transfer the card to another person.

However, when debit cards, or material from which they are made, are purchased in a sales transaction that does not also include the telephone time associated with the debit cards, the ''true object of transaction'' is the purchase of tangible personal property for use by the purchaser, i.e., the purchase or manufacture and subsequent transfer of the debit card as part of a nontaxable transfer of telephone time. This purchaser is the consumer of the debit cards (or the raw materials from which they are made). Therefore, a service provider in this state may not issue a resale certificate to purchase materials which the service provider will use to make debit cards that it will transfer as a representation of telephone service purchased. Further, if the service provider purchases the material from an out-of-state vendor to make the cards, the service provider is responsible for payment of the use tax on that use. 7/28/95.

515.1340 **Telephone Service.** Service charges for ordinary telephone service and for ''leased lines'' for telephone or teletype service are not charges for leasing of tangible personal property. 12/31/65.

515.1360 **Television Audience Reports.** The sale of information gathered by statistical means in the form of printed pamphlets concerning a television station's own viewing audience is not the sale of tangible personal property but rather the sale of a service. The sale of audience ratings reports for various other areas which are of interest to stations generally is a sale of tangible personal property. The latter reports may qualify as exempt periodicals if they meet the requirements of Regulation 1590. 5/10/66.

515.1364 **Television Commercial Encoding and Monitoring Services.** A company enables television advertisers to more accurately and efficiently determine whether the television commercials they have purchased have been broadcast at the time and in the form and market agreed to under a contract. The company has obtained from the FCC an exclusive right to use one line of the 525 that appear on a television screen. It has developed a device that encodes on this

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line a signature which is unique to each commercial. An independent party has been contracted to do the actual encoding on the master copy of the commercial using this company's equipment. The company has also developed a device that can monitor all television broadcasts in a given market and record exactly what commercials have been broadcast, the time they were broadcast, and the audio and visual quality of the commercial.

The described encoding procedures constitute fabrication labor but are excluded from the definition of a ''sale'' and ''purchase'' as qualified production services.

As for the monitoring service, the company will issue reports to the customers in the form of a computer printout or in the form of a data file transmitted over a communication line between computers. Under these facts, the true object of the contract with the customers is the rendering of a service. The company's charge for the monitoring service is not subject to tax even though some tangible personal property is transferred to the customers. 9/1/89.

515.1370 **Time Value Reminder Service.** A person who provides a client (a construction contractor) with a weekly printed job status report, based on client furnished information, is providing a service rather than selling tangible personal property. The incidental inclusion of information in the report, which is not specifically requested by the client, such as a safety topic, would not result in a taxable sales transaction. 5/14/84.

515.1380 **Title Insurance Companies.** Where a title insurance company in addition to furnishing a policy of title insurance, which service is nontaxable, also furnishes copies of documents for which a separate charge is made, the latter charge is subject to sales or use tax. 6/3/54.

515.1400 **Traffic Consultants.** A traffic consultant's charges to a trucking company for per hour consultation for compiling data on freight tariff rates are not subject to tax because the consultant is performing a service. 4/15/68.

515.1402 **Transfer of Data Base on Hard Disk or Tape.** The transfer of a data base by way of a hard disk or tape to a successor of a business to be used to publish directories is a sale of tangible personal property rather than a sale of intangible assets. Accordingly, the transfer is subject to tax. 11/19/91.

515.1404 **Translating Documents.** As the form and contents of a document are not changed in any way during the translation, for a fee, from one language to another, the transaction is considered to be a service transaction even though some tangible personal property is furnished to the customer. Consequently, the charges for this service are not subject to sales or use tax. 8/30/83.

515.1405 **Translation Services.** Agreements to translate specific documents, data, or other information from English into a foreign language, pursuant to the request of a single customer, is a service agreement. As such, the service is not taxable even though the translation is transferred on a form of tangible medium such as a diskette. However, if the customer is provided with additional copies of the translation, the charge for the additional copies is subject to tax.

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In addition, the translator is the consumer of the property, i.e., diskette, which it uses incidentally to provide the service. Therefore, tax applies to sale of such property to the translator. 12/8/92.

515.1412 **Use of Property on a Development Program.** A taxpayer purchased property ex-tax under resale certificates for use on a program to develop a new printing system. The customer was to pay a stated amount for the system if the development was successful. The customer found the system to be unacceptable and returned it to the taxpayer. The customer was not obligated to pay for the system and did not. The taxpayer ultimately scrapped the system and wrote off the development costs.

The taxpayer is liable for use tax on the cost of the material used in the development program. The property was not utilized solely for incorporation into property which was resold in the regular course of business. The property was used experimentally to determine the feasibility of the system. 1/17/75.

515.1417 **Vehicle Tracking Services.** A corporation provides vehicle tracking services to its subscribers using a system of satellites, terrestrial radio towers and receiving and transmitting units. All of the equipment is owned by the corporation. The receiving and transmitting units are installed in the subscriber's vehicles and business office. Information received by subscriber is displayed on a computer terminal that includes both mapping and text format. The location of the subscriber's vehicles are shown on a detailed map of the area. The accompanying text includes information regarding the vehicle speed, heading, location and distance from the subscriber's home base. The corporation retains title to the equipment provided to its subscriber under the service contract and is responsible for all maintenance and repairs with respect to such equipment. Subscribers pay a flat monthly fee for use of the vehicle tracking system and the two-way radio communications systems. The equipment furnished subscribers is furnished without any specific lease agreement and is returned to the corporation at the end of the contract term.

Under the above conditions, the providing of the equipment to the subscriber is incidental to its tracking and communications services; and therefore, the corporation is the consumer of property furnished to its subscribers. 12/27/94.

515.1420 **Viewers Furnished Patrons.** Disposable or permanent type viewers furnished free of charge to patrons are taxable to the theatre management as the consumer.

Where a separate charge is made for the use of disposable type viewers, the management is the retailer and charge is subject to sales tax.

Where a permanent type of viewer is furnished for a separate charge, the management is regarded as the consumer of the viewer and subject to tax since permanent type viewers are returned by the user. 10/28/53.

515.1430 **Washrooms and Restrooms.** Persons engaged in the business of servicing washrooms, restrooms, and similar facilities are the consumers of toilet tissue, soap, seat covers, and the dispensing equipment furnished and installed,

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provided there is no separate charge for the tangible personal property. If, however, the person provides these items without installing them, the person is making a taxable sale. 2/2/79.

515.1435 **Word Processing Activities.** Charges for keyboarding a manuscript, printing a draft, and emitting or printing a final copy are not taxable. If carbon copies are prepared at the time that the original is prepared, charges for the copies are not taxable. If photocopies are prepared, the charges for the photocopies are taxable. If the diskette upon which the manuscript is stored is transferred, tax applies to the charge for the diskette.

After the preparation of the manuscript, it is stored on a diskette. At a later time, codes for typesetting are inserted and the diskette is transferred to a publisher for use in setting up the printing process. The diskette is then returned to the preparer. The charges to the publisher for coding the diskette are taxable.

A writer's work is keyboarded and coded for typesetting at the same time. A printout that can be scanned by a typesetting computer is furnished to the writer. The printout resembles an ordinary manuscript printout and is printed on normal letter size paper. The charge is not subject to tax. However, tax applies if the diskette is transferred. 10/6/82.

515.1450 **Conversion of Filing System.** A firm was hired to convert an existing filing system to a new system. The conversion involved: (1) selling of file folders, back-up file folders, extra alphabetic letters and labels, (2) attaching alpha letters, name labels and classification labels on new folders, (3) converting and shelving old files in new file folders and integrating a separate filing system into the new system.

The charges for (1) and (2) are taxable as sales of tangible personal property. The charges for (3) are nontaxable if the customer can obtain the filing system without the services and the charges are separately stated. However, if the customer must purchase these services in order to obtain the filing system, such charges are services which are part of the sale and subject to tax. 6/8/94.

515.1460 **Credit Reporting Service.** A firm that sells credit reports to a company's customers for the company's use in determining a customer's credit worthiness is regarded as providing a nontaxable service. The providing of an actual report (i.e., the credit report on paper) by the firm is incidental to the credit reporting service provided to the company. Sales of additional copies of the report would be regarded as taxable sales of tangible personal property. (Regulation 1502(d)(5)(f).) 7/25/95.

515.1800 **Loaned Employee—Art Work.** A person who is furnished by a contract staffing agency to perform the [fabrication] art work may qualify as a ''loaned employee'' when the customer provides the premises where the work is done, tools used, and the raw materials, and if the charge is at an hourly rate. However, the charges made by the contract staffing agency with respect to fabrication labor for a consumer will be treated as taxable gross receipts unless: (1) the customer has other persons who are clearly employees performing similar

SERVICE ENTERPRISES, ETC. (Contd.)

work, or (2) the customer employs persons who are capable of giving meaningful direction to the ''loaned employee'' beyond describing only the result desired. 11/30/87.

515.1970 **Make-Up Artist.** Make-up artists perform a service when applying make-up and expendable prosthetic appliances to actors, actresses and other performers. Accordingly, tax applies to the sale to make-up artists of the materials the make up artists consume in applying the expendable prosthetic appliances. 8/25/87.

515.2000 **Methaline Blue Test.** A customer sends the taxpayer a sample piece of film which the customer has already processed. The taxpayer will run a test on the film called Methaline Blue Test. This is to check for any residue that might be left on the film. This test determines the longevity of the film.

If all the taxpayer transfers to its customer is a written report consisting of text only (no photographs, drawings, or diagrams) analyzing the results of the Methaline Blue Test, the taxpayer is regarded as providing a nontaxable service. The transfer of the written report to the customer is incidental to the service provided by the taxpayer. Tax applies to the sale of the property (i.e., paper) to the taxpayer or to its use of that property. On the other hand, if the taxpayer transfers any other tangible personal property to its customers, such transfer would be regarded as retail sale of tangible personal property subject to sales tax. 10/30/95.

SERVICE OF PROCESS
See Collection of Tax by Board.

SERVICEMEN'S USE TAX LIABILITY
See Vehicles.

SHIPPERS
See Interstate and Foreign Commerce; Packers, Loaders, and Shippers.

SHOE REPAIRMEN
See Miscellaneous Repair Operations.

SIGNS, SHOWCARDS AND POSTERS
See Printing and Related Arts.

SILVER BULLION
See Coins and Bullion.

SOCIAL CLUBS
See Taxable Sales of Food Products.

527.0000 SOUND RECORDING—Regulation 1527

527.0050 **Audiocassettes as Advertisements.** A taxpayer produces audiocassettes for clients for the purpose of advertising products or services offered by the clients. The audiocassettes play for 2 to 10 minutes. Sufficient copies are made for use on radio commercials, syndicated radio programs, or

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educational purposes. The copies are regarded as master recordings with tax applicable only to the charge for the blank tape. 6/28/91.

527.0100 **Compact Disks for Radio Commercials.** Subdivision (b)(1) of Regulation 1527 defines ''master tapes and master records embodying sound'' to mean tapes, records, and other devices, not including mothers, stampers, or finished records utilized by the recording industry in making recordings embodying sound. The term includes tapes or records which are produced for use as radio commercials or other advertising, syndicated radio programs, or for educational purposes.

Accordingly, if a taxpayer produces and sells compact discs to be used for radio commercials, the taxable measure with respect to the retail sale of such compact discs is limited to the sales price of the unprocessed recording media (compact discs). 2/5/90.

527.0140 **"Educational Purposes."** The term ''educational purposes'' as used in Regulation 1527 includes master tapes or records used which are produced for general instruction or training presentations. The term is not limited to instruction received at a school or college. 12/31/85.

527.0300 **Master Lacquers.** A firm's invoices show charges for masters and lacquers. Section 6362.5 provides a partial exemption from sales tax for the sale of ''master tapes or master records embodying sound''. This term includes lacquer masters, cassette masters, or CD masters produced by a mastering lab for a recording company.

The charge for masters and lacquers qualifies for the partial tax exemption. Tax would apply only to the portion of the charge that represents the charge for the blank recording tape or disc. 6/8/92.

527.0325 **Master Tapes.** A record company purchases an original master tape from a group of musicians and makes a subsequent retail sale of the master tape to a recording company.

Under these facts, sales tax applies to the sale of the master tape by the record company to the recording company. The measure of tax is the sale price of the unprocessed recording media (blank tape). 3/15/89.

527.0340 **Master Tapes and Records.** Master tapes and master records under regulation 1527(b)(1) will generally include the lacquer master, cassette master, or CD master produced by a mastering laboratory for a recording company from a two track tape. The multi track and two track tapes produced by recording and mix studios would therefore be considered intermediate working productions included within the exemption for master tapes and records. The furnishing of ''mothers,'' ''stampers,'' and finished records by a processor to a record manufacturer remain sales of tangible personal property subject to tax. 5/29/96. (Am. 2000–1).

527.1008 **Radio Commercials Delivered Electronically.** A taxpayer is in the business of sending radio commercials from recording studios hired by their

SOUND RECORDING (Contd.)

customers (advertising agencies) directly to radio stations through a multimedia communications network established by the taxpayer. The multimedia communications network is comprised of Record Send Terminals (RST's) located at various recording studios, and Receive Playback Terminals (RPT's) located at radio stations. The RPT's and RST's communicate with the Taxpayer's Network Operations Center located in California through standard telephone lines. The recording studios do not pay taxpayer for use of the RST's or RPT's. Rather, taxpayer provides such equipment to them free of charge.

The RST's and RPT's are essentially customized multimedia computers (equipped with modems) that are either purchased or leased by the taxpayer, with the taxpayer paying sales tax reimbursement or use tax resulting from the purchase or lease. The Taxpayer's Network Operations Center functions essentially like a switchboard, receiving radio commercials from an RST located at a recording studio and routing the radio commercial to the appropriate RPT at the radio station.

The taxpayer's charges to advertising agencies are based on the number of commercials distributed at one time to a radio station on the agencies' behalf and the time frame within which the distribution is made. In cases where a radio station is not part of the taxpayer's multimedia communications network, i.e., the radio station does not have an RPT on-site, the taxpayer will transfer the radio commercial onto audio tape at its out-of-state facility and have the tape delivered by courier to the radio station. In those instances, the taxpayer pays sales tax on the purchase price of the blank tapes.

Under the facts presented, the taxpayer is regarded as using the RST's and the RPT's itself, rather than leasing them. The charges made by the taxpayer are not for the RST's and RPT's, but for the transmission of the recordings. The transfer electronically of the radio commercials from the recording studios to the radio station through the taxpayer's multimedia communications network is not a sale of tangible personal property and, therefore, is not a taxable transaction.

On the other hand, when the taxpayer's out-of-state facility copies a radio commercial onto audio tape and then sends the audio tape to a radio station in California, there is a transfer of tangible personal property, the audio tape. Since the taxpayer is a retailer engaged in business in California, the transfer of the audio tape for a measurable monetary consideration to a radio station in California is a taxable transaction. The measure of tax for the transfer of the audio tape is the sales price of the unprocessed recording media (the blank audio tape). (Regulation 1527(a)(1).) 1/4/96.

527.1100 **Sound Recording for Commercials.** A firm produces sound recordings for use by advertising agencies in commercials for radio and television. It hires its own musicians, writes the music, and makes its own arrangements for the recording session. The session is recorded on 24 track 2″ tape which is subsequently mixed down to ¼″ mono or stereo and 3–4 cassette copies.

The firm consumes the 2″ tape in manufacturing the ¼″ tape, and therefore cannot purchase the 2″ tape for resale. It is also the consumer of the ¼″ tape

SOUND RECORDING (Contd.)

which incorporates sound to be used on a film or videotape commercial since the creation of the music track is a ''qualified production service''. It is the retailer of the ¼″ tape used in radio commercials. However, the tapes are ''master tapes'' and the measure of the tax is therefore limited to the sales price of the blank tape. 10/6/89.

527.1250 **Syndicated Radio Programs—Master Tapes.** Tapes and records used in the broadcast of syndicated radio programs are ''master records'' and the lease of these tapes to radio stations qualifies for the partial exemption as provided in Regulation 1527. 3/10/92.

SPACE
Advertising, sale of, see Tangible and Intangible Property.

530.0000 STATE AND POLITICAL SUBDIVISIONS
State Agencies, sales between, see also Person.

530.0020 **Buildings.** A redevelopment agency is subject to sales tax upon sales of buildings to be removed from the land, if at least three or more sales are made within a twelve-month period. 6/18/54.

530.0040 **Counties.** Sales made to a county on county purchase orders and paid for by county warrants, should be regarded as sales to the county even though, pursuant to an agreement, the merchandise is delivered to the United States Forest Service for use in fire protection; the county is not to be regarded as reselling the merchandise to the United States. 10/2/52.

530.0050 **County Public Housing Authority.** County public housing authorities are public bodies, corporate and politic. While there is a sales tax exemption for sales made to the United States, there are no exemptions for sales made to or by political subdivisions of this state. 11/1/93.

530.0060 **County Welfare Departments.** County welfare departments obtain breathing apparatus by lease and purchase for use by persons receiving aid under the California Public Assistance Medical Care program. Lessors of such apparatus are authorized to report tax measured by their receipts from the rental thereof and sellers are required to report tax on the gross receipts from the rental sale of such apparatus. 4/8/65.

530.0080 **Fire Apparatus.** Sale of fire apparatus to governmental agencies, incorporated municipalities or voluntary firemen's organizations are not exempt from taxation. 1/14/65.

530.0100 **Fire Apparatus.** Sales and use tax apply to retail sales of fire fighting equipment to the state and its political subdivisions including municipalities to the same extent as if the purchaser were a private individual or company, such as volunteer firemen's organizations, since the law provides for no exemption for such sales. 11/27/62.

STATE AND POLITICAL, ETC. (Contd.)

530.0140 **Impounded Animals.** The sale of impounded animals by municipalities or counties is subject to sales tax. See Opinion of Attorney General No. NS-3763, dated September 4, 1941. The fact that the amount received for the animals is designated as a ''placement fee'' is immaterial. It constitutes a consideration paid for the animals. 11/2/65.

(This opinion was superseded by section 6010.40, operative January 1, 2000.) (Am. 2000–2).

530.0160 **Impounded Animals.** A county selling impounded animals is engaged in business, despite absence of profit motive. 1/31/51.

(This opinion was superseded by section 6010.40, operative January 1, 2000.) (Am. 2000–2).

530.0165 **Joint Powers Agreements.** Absent an applicable statutory exemption, sales and use tax applies to sales to and purchases by the state and all of its political subdivisions, including quasi-governmental entities operating under a joint powers agreement, to the same extent as to sales to and purchases by other persons. There is no general exemption provided in the law for the state and its subdivisions. 4/29/94.

530.0180 **Medi-Cal Patients.** Sales to Medi-Cal patients are taxable to the same extent that they would be if made to other persons even though payment is made by a state agency administering the aid. 4/10/68.

530.0200 **Municipal District.** A municipal utility district holding a seller's permit and making miscellaneous sales of equipment from time to time is taxable on such sales. 8/10/53.

530.0220 **San Nicolas Island.** The sales tax applies to the purchase of materials by construction contractors for the construction of improvements to real property on San Nicolas Island, the island being in the State of California. 7/22/57.

530.0240 **School Districts.** The retail sale of a school bus by one school district to another school district is taxable. 4/25/68.

530.0260 **School Districts.** Sales to school districts are not exempt. 3/23/60.

530.0280 **Sharing Cost With Federal Government.** Where the Federal Civil Defense Administration purchases equipment and bills the state or political subdivision for one-half the cost, no use tax is due. This is a purchase by the Federal Government, with the state or subdivision contributing one-half of the cost. If, however, the state or local government makes the purchase from California or out-of-state vendors, sales tax or use tax, as the case may be, is due. 11/7/55.

530.0300 **Tax Sales by Municipalities.** In the absence of evidence to the contrary, tax sales by counties and cities are presumed to be occasional sales or sales for resale with respect to which liability for sales tax does not arise. 1/19/62.

STATE AND POLITICAL, ETC. (Contd.)

530.0320 **University of California.** The University of California is considered a state agency within the meaning of Opinion of Attorney General 10478, dated February 3, 1936. Accordingly, transfers between the University of California and other state agencies are not ''sales'' and sales tax does not apply to the receipts of the transferor agency from the transferee agency. The tax does apply to the sale to the agency which makes the transfer to the other agency. The sale to the first agency is taxable as a retail sale because the agency is not buying the property for ''resale'' to the other agency. 3/13/67.

STATUTE OF LIMITATIONS
See Remedies of Taxpayers.

STORAGE
See Use of Property in State and Use Tax Generally.

STUDENTS
Meals, see Taxable Sales of Food Products.

STUDIOS
See Motion Pictures. Recording, see Sound Recording.

SUBSTANTIAL CHANGE IN FORM
See Leases of Tangible Personal Property—In General.

535.0000 SUCCESSOR'S LIABILITY—Regulation 1702

535.0002 **Assets Associated with A Business.** Under the terms of a contract, B assigned its existing leases of premises, furniture and fixtures, trade name, customer lists, and goodwill together with the right to negotiate new leases to A. A did not acquire any inventory or accounts receivable from B. A stated that in actuality it did not utilize all of the assets assigned to it by B. Nevertheless, A is the successor to B. The accounts receivable and inventory are not essential elements of a business. A acquired all of the essential elements of the business from B and is liable as a successor to B under Revenue and Taxation Code sections 6811 and 6812. 6/5/75.

535.0003 **Assumption of Liabilities.** A taxpayer entered into an agreement to purchase from A his (1) supplies, (2) inventory, (3) furniture, (4) office equipment, and (5) miscellaneous items. In consideration the taxpayer assumed the following:

(1) A's liability of $6,200 to an awning company.

(2) A's liability of $2,200 on the purchase of an office unit.

(3) A's liability of $1,290 for phone, lights and carpet.

(4) A's flooring on five mobile homes and two furniture packs.

The agreement specifically provided that ''this is not a purchase of a business, but consists entirely of a purchase between buyer and seller of merchandise, parts, inventory for proper consideration.''

SUCCESSOR'S LIABILITY (Contd.)

The taxpayer cites the agreement's language and the following factors to support its contention that it was not a successor.

(1) It negotiated a new lease directly with the landlord.

(2) It did not retain the business name, phone number, permits and did not acquire goodwill.

(3) New accounts were opened for utilities.

(4) It moved the old office building and replaced it.

(5) It did not acquire receivables and did not assume warranties on mobile homes sold by A.

(6) A retained some mobile homes which were in inventory. These were homes on which deposits were taken but were not sold and delivered by the time of the transfer.

(7) It did not receive an assignment of the dealer reserve account.

(8) It used its own Department of Motor Vehicle license to operate.

(9) It did not use A's signs, marks, logos, etc.

(10) A did not sign a covenant not to compete.

The taxpayer is considered a "purchaser" and a "successor." It could have assumed fewer of A's liabilities and used the funds to pay A's outstanding tax liability. Thus, it had the means to withhold a sufficient amount to pay the tax liability. 12/23/76.

535.0004 **Assumption of Liability.** A taxpayer transfers its business or stock of goods to another person in exchange for the assumption of liabilities by the transferee. The assumption of liabilities is consideration; thus, the transfer is a sale. It follows that the transferee is liable as a successor to the extent of the liabilities assumed. 3/6/84.

535.0010 **Cancellation of Billing Followed by Rebilling.** A notice of successor liability was issued against a corporation. This billing was later canceled. Still later a new successor liability billing was issued against the corporation. The cancellation of the first billing does not constitute a binding determination because it did not represent a notice of redetermination by the Board. The second billing was valid as long as it was issued within the limitation period. An administrative agency is authorized to correct an error and issue another notice of successorship liability. 6/21/94.

535.0012 **Cancellation of Seller's Indebtedness.** The cancellation of the seller's indebtedness is a form of purchase price sufficient to impose a duty to withhold on the successor. When the only consideration the purchaser gives is the cancellation of the seller's indebtedness, the purchaser may deny the seller the cancellation of the indebtedness and thereby make such consideration available to the state to satisfy the seller's tax liability. 2/28/85.

535.0014 **Consideration—Payment Made to Seller's Lender.** A taxpayer purchased the inventory of another company. At that time, the company from which the inventory was purchased was indebted to the Board for unpaid sales

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taxes. The taxpayer agreed, as sole consideration for the purchase of the inventory, to pay all of the seller's obligations that were secured by the inventory directly to the seller's lender.

When the Board issued its Notice of Successor's Liability to the taxpayer, the taxpayer claimed that the successor's liability was improper because there was no purchase price paid from which a withholding could have been made.

When the taxpayer negotiated for the purchase of the inventory of the other company, it paid for the inventory by its promise to pay the purchase price directly to the other company's lender. Under the holding of the *Knudsen Dairy Products Co.* v. *State Board of Equalization* (1970) 121 Cal.App.3d 47, the taxpayer had a duty to structure its purchase agreement with the other company in such a manner as to provide for the payment of the outstanding tax liability to the Board. Accordingly, the successor liability was properly imposed upon the taxpayer. 3/11/96.

535.0018 **Effect of Secured Creditors Liabilities.** The fact that secured liabilities are as much as the purchase price of the business does not relieve the successor of successor's liability of his predecessor's sales tax liability. 12/12/90.

535.0020 **Fixed Assets.** A sold to B and leased back the fixed assets of A's California stores; B resold the assets to A, and A sold them to C. The tax on the resale from B to A is unpaid. In such case, successor's liability cannot be asserted against either A or C under Sections 6811 and 6812 because there must be a sale of the business or stock of goods for successor's liability to attach. B did not sell its business nor did it sell a stock of goods, since "stock" or "stock of goods" refers only to goods or chattels which tradesmen hold for sale. 4/22/59.

535.0022 **Foreclosure.** A foreclosure is not a sale. Thus, successor's liability will not attach as a result of a foreclosure. However, an agreement between two parties to transfer a business in payment of an antecedent debt is not a foreclosure. An agreement of this type is a sale subjecting the buyer to any successor liability. 8/10/94.

535.0025 **Foreclosed on the Security.** A trust was the holder of a note from a limited partnership that owned and operated a hotel. The note was secured by the property. The limited partnership defaulted on the note and the trust foreclosed on the property. The real property and improvements were acquired by the trust as the bidding beneficiary at a trustee's sale. The personal property, including the furniture, fixture, equipment, and inventory were also acquired by the trust at the trustee's sale pursuant to section 9501(a)(ii) of the California Uniform Commercial Code.

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The trust will sell the furniture, fixtures, equipment and inventory to a new operator of the hotel. It will sell the real property and improvements to an investor. The investor will in turn lease the real property and improvements to the new hotel operator.

The foreclosing on the mortgage by the trust does not result in the trust incurring successor's liability for the sales and use tax liability owed by the original hotel owner and operator or any prior predecessor. Also, neither does the new hotel operator nor the investor incur successor's liability for the liability of the original hotel owner and operator or any predecessors. (Regulation 1702(a).) 9/26/94.

535.0028 **Fraudulent Conveyance.** A taxpayer (A) held a seller's permit as an individual. After audit, a notice of determination was issued. The taxpayer made a gift of all the assets of the business to his wife. His wife operated the business for a period of time and then transferred the assets to a commencing corporation in exchange for stock. The corporation denies any liability for taxpayer A's unpaid taxes.

Former Civil Code section 3439.04 provides that every conveyance made by a person who is or will be rendered insolvent is fraudulent to creditors without regard to his actual interest if the conveyance is made without a fair consideration. Accordingly, if a taxpayer renders himself insolvent by conveying all of his property to someone else, the conveyance can be set aside by the taxpayer's creditor to satisfy a creditor's claim or the creditor can disregard the conveyance and attach or levy execution upon property conveyed. (Civil Code section 3439.09) This procedure should be followed in the above case. 4/23/85.

535.0032 **Guarantor As Original Purchaser.** A shopping center owner has a shopping center with a grocery store occupying about 60 percent of the area of the shopping center. The grocery store was an anchor tenant, which attracted customers to the other tenants' businesses. Without this anchor tenant the center's owner might have lost other tenants in the shopping center. The center's owner extended financial assistance to the owner of the grocery store in an effort to keep this tenant. The shopping center owner signed a continuing guarantee in which he guaranteed to pay up to a certain amount of any indebtedness incurred by the owner of the grocery store to the store's main supplier. He also lent the grocery store owner a sum of money to infuse cash into the business and help continue its operation. The financial assistance proved fruitless and the owner of the grocery store left. The shopping center owner took over the operations of the store the following day and changed the name of the store. Because the grocery store was an anchor tenant and because the shopping center owner could be liable under the guarantee for the owner's debts, he felt compelled to keep the business going. Shortly after the owner left the store, he and the center's owner entered into a sales agreement whereby the store owner sold the lease of the premises, his interest in equipment, furniture, and fixtures, inventory of stock in trade, and the name and goodwill of the business. The money deposited in escrow was used mostly to pay other lienholders whose liens encumbered the property of the

SUCCESSOR'S LIABILITY (Contd.)

grocery store and only a small amount was paid to the Board. Thereafter, a notice of successor's liability was issued. The above situation raised the following issues.

(1) Whether the center's owner, as a third party guarantor, should be considered the ''original purchaser'' of the inventory.

If so, the center's owner did not purchase the inventory since he already owned it. In this situation, the guarantee was not made in connection with the purchase of any particular property. There are no terms in the guarantee or in any other agreement executed prior to the sale in issue which indicate that title to the inventory vests in the center's owner. Therefore, the center's owner was not the owner of the inventory at the time of the sale.

(2) Whether the payment made by the center's owner into escrow and paid to the store's main supplier is consideration since the center's owner was liable to the supplier as guarantor.

The purchase price was paid into escrow, and the escrow agent distributed the funds to the creditors of the prior owner including its main supplier. Accordingly, the prior owner received a benefit, i.e., consideration, by having its liabilities to the main supplier extinguished. Its contingent liability to the center's owner was also extinguished since the center's owner was no longer liable under the guarantee.

(3) Whether the current owner of the grocery store can be liable as successor when the full purchase price was committed to other creditors who had claims with higher priority than the Board's claim.

Secured liabilities in an amount as much as the purchase price does not avoid the clear statutory provisions that a successor is liable for his predecessor's sales tax liability (up to the amount of the purchase price) if the successor does not obtain the certificate provided for under Regulation 1702(c). 9/21/93.

535.0040 **Survivor's Liability.** Corporation A enters into a statutory merger with Corporation B followed by a statutory merger with Corporation C, who is the survivor. Notices of Determination are issued to Corporations A and B. Corporation C may file petitions for redetermination of those determinations since, as the survivor of the statutory mergers, it now stands in the place of the two disappearing corporations. Whatever those corporations owed at the time of the mergers, Corporation C now owes as if it had incurred the liability itself. Thus, if there remains any tax due after the administrative proceedings on the determinations issued against the two disappearing corporations, Corporation C, as the survivor of the mergers, will owe that liability. This would not be liability as a successor, but rather Corporation C will have direct liability as if it were the two disappearing corporations, since, by virtue of the mergers, it effectively was. Accordingly, with respect to the determinations issued against Corporations A and B, Corporation C may file petitions for redetermination of its potential tax liability. 7/2/92. (Am. 2000–1).

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535.0043 **Jeopardy Determination—Successor Liability.** The Board may issue a jeopardy determination against a successor if it finds that the collection of tax would be jeopardized by delay. If a jeopardy determination is issued against a successor, the successor is entitled to petition in the same manner as described under section 6561. 10/23/79.

535.0046 **Lessee Satisfies Own Liability, Not Liability of Sublessee.** A taxpayer leased real property, signing a personal guarantee for performance of the lease terms. The taxpayer constructed a car wash on the property. The taxpayer sold the car wash and subleased the real property to a third party. The third party subsequently encountered financial difficulties and returned the business to the taxpayer. At the time the third party was in arrears both on payment of sales tax and in rent payable to the owner of the real property. The taxpayer paid the back rent and took over operation of car wash.

There is no successor liability related to the third party's outstanding sales tax liability. The taxpayer's payments to the lessor of the real property were in satisfaction of the taxpayer's own liability under the personal guarantee. The payment was not an assumption of the debts of the third party. 2/4/94.

535.0050 **Liability Limited to Specific Business.** A taxpayer purchases a manufacturing facility in this state. The seller has a tax liability for the manufacturing location as well as liabilities related to other businesses. Since for purposes of successor liability each location is a separate business, the purchaser's liability as a successor arises only with respect to the tax liability arising from the manufacturing facility. 10/16/90.

535.0052 **Occasional Sales.** On July 31, a buyer and seller enter into an agreement for the sale of certain identified assets free and clear of all encumbrances of any kind or description. The agreement requires that the seller furnish to the buyer a certificate from the Board of Equalization stating that no amount of sales or use tax is due from the seller.

On August 15, the seller files a petition in bankruptcy. Under the terms of the sale and purchase agreement, the consummation of the agreement is subject to approval and ratification by the bankruptcy court.

Since the transfer of assets was conditioned on approval by the court, the sale did not occur, for sales and use tax purposes, until after the bankruptcy petition was filed. Pursuant to Regulation 1702(a), the requirement regarding withholding the purchase price does not apply to sales made to trustees in bankruptcy. The seller, as a debtor-in-possession, has all the rights and powers of a trustee in bankruptcy. Under these facts, the buyer is not required to withhold from the purchase price an amount for the payment of any sales or use tax liability of the seller. 11/1/90.

535.0055 **Partial Payment.** The payment to the Board by a successor of an amount believed to be the entire liability of the predecessor does not shield the successor from successor liability for additional amounts unless the successor obtains a certificate pursuant to section 6812 from the Board stating that no amount is due. 6/15/77.

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535.0056 **Partnership.** Where a sole proprietor contributes his business assets to a commencing partnership and another person contributes cash and assets to the partnership, the formation of the partnership is not the result of a purchase of the proprietor's business. Consequently, the person contributing cash and assets is not a successor with respect to sales tax liability subsequently disclosed which pertained to the operation of the proprietor prior to the formation of the partnership. 2/23/72.

535.0057 **Penalties.** A successor is not liable for penalties which accrue against the predecessor after the date of the purchase of the business or stock of goods. 10/22/87.

535.0060 **Purchase From Bankruptcy Trustee.** A person who purchases corporate assets from a bankruptcy trustee does not become a successor to the bankrupt business. 1/6/95.

535.0060.325 **Purchase of Inventory Subject to Senior Security Interest.** The Board imposed successor's liability on a company because it purchased the inventory of Corporation A without providing for payment of the outstanding sales tax liability. The fact that the inventory may have been subject to a senior security interest is irrelevant. The Board is not imposing a superior lien on the inventory sold which would require the purchaser (company) to pay the Board rather than the holder of the senior lien when inventory is sold. Rather, the liability is imposed on the purchaser for taxes due by the seller, Corporation A, pursuant to section 6811. The fact that there was no cash left from the purchase price to withhold does not relieve the purchaser from liability under section 6811. 4/22/96.

535.0061 **Purchase of Out-of-State Assets.** A taxpayer purchases the out-of-state assets of a California business which primarily is located outside California. The seller maintains only a warehouse/sales office in California. The warehouse/sales office is not included in the transaction and it is closed at about the same time that the transaction is entered into. The assets transferred are substantially all of the assets of the seller. The seller owes amounts of tax and interest to the Board at the time of the transfer. The taxpayer does not obtain a tax clearance from the Board.

Successor's liability can arise from the purchase of a substantial portion of a business or stock of goods. It is not necessary that the entire business or stock of goods be transferred to the purchaser. Since the seller is engaged in business in California, it is immaterial that the assets purchased are located outside California. 6/2/94.

535.0061.825 **Repossession of Collateral.** A married couple sold all of its stock in a corporation which owned and operated a hardware store. The purchasers executed promissory notes, security agreements, and a pledge agreement for the purchase of the stock. The couple later assigned these documents to a revocable trust created by them.

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The purchasers defaulted and the parties entered into an ''Agreement for Repossession of Collateral in Satisfaction of Debt'' which provided for the return of all collateral, including the shares in the Corporation, to the trust. Upon receipt by the trust, the purchaser's notes were deemed satisfied. The trust, in turn, assigned the property to the couple who applied for a seller's permit to operate the business in their names. The couple is subject to successor's liability. 3/18/97.

535.0062 **Request for Tax Clearance.** A taxpayer purchased the assets of Company A, inclusive of the right to do business under its name. When Company A ceased to do business, the taxpayer submitted a final return on behalf of Company A together with correspondence advising the Board that (1) the return was for the period October 1, 1989 through October 12, 1989; (2) taxes due for subsequent period(s) would be included in taxpayer's return(s); and (3) by agreement, payment of the sales tax related to the purchased assets was the responsibility of the taxpayer. The Board was requested to contact taxpayer should any additional questions arise.

Under sections 6811 and 6812, a taxpayer's request to the Board for a certificate that no taxes, interest, or penalties are due from the seller must be clear and unambiguous. Nowhere in taxpayer's letter to the Board is there an express or implied request for such certificate. The letter merely puts the Board on notice that taxpayer has purchased assets of the company. This clearly does not satisfy the requirements of section 6811 and 6812. Therefore, the letter cannot be accepted as a request for tax clearance. 1/5/94.

535.0065 **Sale of Business Assets.** A newspaper ceasing publication agreed to sell certain assets to a purchaser. The assets included intangible assets, all subscriptions, circulation and advertising lists, microfilm copies of back issues, related libraries, morgues, all delivery trucks and newspaper racks. At the time of the sale the newspaper owed outstanding tax liabilities.

The purchaser is a ''successor or assign'' of the seller, within the meaning of Revenue and Taxation Code Section 6811. As such, successor's liability would be imposed on the purchaser if the amount of the tax due and payable by the newspaper, is not withheld and remitted to the Board at the time of sale. 7/13/93.

535.0070 **Sale of Liquor Store.** A taxpayer, who sold a liquor store with a liquor license, later foreclosed on the purchaser and regained ownership of the store and license. The Board refused to release its hold against the transfer of the liquor license back to the taxpayer until the purchaser's tax debt was paid.

The hold on the liquor license was not due to successor's liability. The hold on the transfer was based upon Business and Profession's Code Section 24049, which provides that the Department of Alcoholic Beverage Control may refuse to transfer a liquor license when the owner is delinquent in payment of any taxes, (due under the Sales and Use Tax Law and other tax laws), when those liabilities arise in whole or in part out of exercise of the privilege of the license. 1/18/91.

535.0073 **Self-Help.** The two principal stockholders of a corporation made a decision to discontinue their business association. They each obtained a portion

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of the equipment owned by the corporation and operated similar businesses separately. This ''self-help'' to the obtaining of business equipment does not constitute a sale such as to cause application of successor liability. The corporate assets are still owned by the corporation and may be levied upon to satisfy the corporate tax debt. The distribution of assets to a shareholder may be recovered by the corporation or by its receiver, liquidation or trustee in bankruptcy if the distribution was made without a court order or without adequate provisions made for payment of the debts of the corporation (see California Corporation Code 5012). 2/25/77.

535.0073.090 **Service Business.** A taxpayer is engaged in a trucking business. He also has a truck selling business for which he has a Department of Motor Vehicles license and a seller's permit. He disposes of used trucks from the trucking business in this selling operation. Substantially all of the assets of the trucking business and the truck selling business are exchanged for first issue stock, the assumption of a liability, and a note.

The taxpayer has incurred a large tax liability primarily from ex-tax out-of-state truck purchases used in the trucking business. The assets of the trucking sales business, which are transferred involve $50,000 of the total consideration. Those of the trucking business represent $5.9 million of the purchase price. The successor corporation's successor liability is limited to the $50,000 related to the trucking business.

The purchase price related to the transfer of the service business is not subject to the successor liability provisions of sections 6811 and 6812. 3/16/90.

535.0073.300 **Spouse.** A spouse is not a purchaser of a business when the business is bequeathed to the spouse by the owner. The estate of the deceased is liable for debts of the deceased. 10/4/89; 7/10/96.

535.0074 **Successor Liability—Transfer In Lieu of Foreclosure.** A former seller of property who reacquires property by deed in lieu of foreclosure when the only consideration received by the purchaser-mortgagor is cancellation of unpaid balance may not be held for successor's liability. There is no ''sale'' when a mortgagee reacquires property under these circumstances. Thus, there is no ''purchase'' within the meaning of section 6812.

On the other hand, the transfer of property acquired by deed in lieu of foreclosure by mortgagees who were not also the sellers of the property are liable as successors. In this case, the transfer is a ''sale'' and ''purchase.'' (See also annotation 365.0040.) 10/23/95.

535.0074.500 **Successor's Liability.** Mr. and Mrs. A entered into an agreement to purchase the stock of a corporation from the owners, Mr. and Mrs. B. The collateral for the promissory notes given by Mr. and Mrs. A to the sellers consisted of corporate assets, i.e., furniture, fixtures, and equipment. Mr. and Mrs. B assigned the notes to their Revocable Trust. After operating the business for several years, Mr. and Mrs. A defaulted on payments due under the promissory notes and the trust ''foreclosed'' on the security interest retained for

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the sale of the stock. Mr. and Mrs. A and the trust entered into an ''Agreement for Repossession of Collateral in Satisfaction of Debt'' whereby Mr. and Mrs. A would turn over all of the corporation's tangible personal property to the original sellers, Mr. and Mrs. B, in satisfaction of the promissory notes. Mr. and Mrs. B then took out a seller's permit under their name and continued to operate the business.

Mr. and Mrs. A owed the Board taxes for their period of operating the business, and the Board issued a successor's liability against Mr. and Mrs. B.

When the trust ''foreclosed'' on the security interest retained for the sale of the corporation's stock, the agreement entered into at that time transferred the corporation's tangible personal property to the trust for a consideration. Under *Knudsen Dairy Products Co.* v. *State Bd. of Equalization* (1970) 12 Cal.App.3d 47, the purchase price need not necessarily flow directly to the seller. The trust, therefore, purchased the corporation's property. Mr. and Mrs. A turned over the corporation's property to the Mr. and Mrs. B trust in exchange for satisfaction of their personal debt to Mr. and Mrs. B. Mr. and Mrs. B obtained the property from the trust and continued the business. Furthermore, since the sale by Mr. and Mrs. B was a sale of stock and not a sale of tangible personal property, they may not utilize California Commercial Code section 9505 to dispose of the collateral in lieu of foreclosing under a security agreement. Accordingly, Mr. and Mrs. B as purchasers of the tangible personal property were also ''successors,'' and the successor liability was properly imposed. 5/28/97; 3/18/97.

535.0075 **Successor's Liability—Formation of Partnership.** C and B formed a partnership to operate a new car dealership. C, who was already engaged in the business of selling cars, contributed all of his individual sole proprietorship assets and known liabilities to the partnership. A certificate of release from successor's liability was not requested by the new partnership. A subsequent audit of C's sole proprietorship disclosed a liability for unpaid sales taxes. The partnership paid various other liabilities assumed from C's sole proprietorship, but not the audit liability. The partnership then dissolved with all the assets being assigned to B along with the assumption of partnership liabilities.

The failure to withhold from the purchase price an amount to cover C's tax audit liability caused the partnership to be liable for that tax as a successor. There is no distinction between a situation where a buyer pays a sum of money to a seller, who then pays the money to a creditor, and the short-cut method followed here where the buyer pays the money directly to the seller's creditors. In these circumstances, a partnership liability for C's taxes was created and it is included in the liabilities assumed by B when the partnership was dissolved. 8/21/41.

535.0076 **Successor's Liability—In General.** A taxpayer incurred a substantial audit liability. The taxpayer subsequently sold approximately 90% of its assets and related business activities which were conducted from a single location to a new unrelated corporation. The taxpayer continued to operate the other 10% of the business. It later sold the assets and stock of goods of the remaining 10% of the business. The audit liability was still outstanding at the time of the second sale.

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Any liability the taxpayer has incurred in its operation of the business will follow the taxpayer, and a purchaser of the remaining business must withhold a sufficient amount of that purchase price to cover any liability of that business, including any debt from the prior (90%) sale of the business. If the purchaser fails to withhold as required, the purchaser becomes personally liable for the amount required to be withheld to the extent of the purchase price. (Section 6811 and 6812).

However, if the taxpayer moved the remaining portion of the business out of state and then it sold the 10% of business or stock of goods which was located out of state to a nonresident of California who would have no intention of doing business in California, the purchaser would not have purchased the business in California. The purchaser would be outside the state's jurisdiction and the Board would not have the authority to impose successor liability. 12/7/93.

535.0078 **Successor's Liability as an Independent Liability.** The provisions of the Sales and Use Tax Law do not provide that the liability of the successor is akin to a surety or that the Board must first exhaust its remedies against the seller. Rather, it is an independent liability that arises by reason of the purchase of the seller's business or stock of goods without a clearance from the Board or without withholding a sufficient portion of the purchase price to cover unpaid taxes. The underlying basis is that the purchaser should be held liable because of the acquisition of the seller's assets that were previously available to satisfy the seller's liability to the Board. 3/21/91.

535.0080 **Withholding by Purchaser.** A taxpayer was liable for unpaid sales and use taxes due from his predecessor because he purchased a used car business and failed to withhold from the purchase price the sales taxes due the state. The predecessor's used car business, which was one of the several businesses of the corporation, failed to report some of the used car sales it made. The taxpayer subsequently purchased the accounts receivable of the used car business and all the stock in trade. The car dealer also took over and operated the car lot of the business. No amount was withheld from the purchase price to pay for the tax liability of the seller, even though there were no certificates of release from the State Board of Equalization. 12/22/71.

535.0087 **Purchase from Probate Estate.** An inquiry was received regarding whether successor's liability can be asserted against a person who bought a business from a probate estate. It appeared that the property purchased was inventory. It was also noted that the estate did not operate the business.

It is concluded that the Legislature intended that Probate Code section 707.5 to be the sole and exclusive method for settling debts of decedents, and that attempting to inject successor's liability would interfere with the orderly administration of probate estates. In addition, the language of section 6811 prohibits the imposition of successor's liability in probate estates. This section requires that the delinquent taxpayer must either sell or quit the business before successor's liability arises. Since death prevented a sale or a quitting of the

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business, no seller/purchaser relationship existed prior to death and probate administration. Therefore, a purchase from a probate estate does not result in successor's liability. 7/8/80.

535.0090 **Purchase of Realty and Equipment.** Where the purchaser bought the realty and equipment of a business which held a seller's permit, began a dissimilar type of business, did not exercise an option to purchase the seller's trade name, customer list, accounts receivable, and did not obtain a covenant not to complete, the purchaser was not a successor for the purpose of Regulation 1702. 6/26/78.

535.0092 **Transfer of Membership Interests in a Limited Liability Company.** A limited liability company ("LLC") does not terminate upon transfer of membership interests unless specified in an agreement of the members. Therefore, in the absence of such an agreement, the transfer of a LLC membership interest is treated as a transfer of intangible personal property the sale of which is not subject to sales tax. 12/29/00. (2002–1)

535.0093 **Transfer to Avoid Tax Liability.** A taxpayer was issued a notice of determination on March 11, 1982. On February 22, 1983, he executed a declaration of a gift of all of the equipment of the business to his wife. On December 31, 1983, he closed out his seller's permit. On December 28, 1983, his wife took out a seller's permit for the business in a corporate name effective January 1, 1984. A notice of successor's liability was issued against the corporation. The corporation has objected to the successor's billing on the basis that there was no consideration.

Successor liability is asserted under these circumstances. The sole purpose for the transfer of the property was an attempt to avoid sales tax liability. To cancel the successor liability would defeat the general purpose of the law and permit the perpetration of fraud. 11/6/84.

535.0095 **Transfer Without Consideration.** Entity A ceased operation of its business. In the same month, B, a former employee of A, secured a seller's permit and commenced the operation of a similar business at the same location under a different name. B dealt with some of the same suppliers as A and retained A's telephone number. The business sign continued to show A's business name. There was no evidence of any payment from B to A for the business, or that B assumed any debts of A's business.

Where a tax debtor transfers the business or stock of goods without assumption of liabilities or other consideration from the transferee, the transferee does not become liable as a successor for the tax debt of the transferor. There is no purchase price from which the transferee can withhold amounts for payment of tax. 7/15/94.

535.0100 **Trusts.** Absent any consideration given to the trustor for property placed in a trust, the successor liability statute does not apply. (see Sales and Use Tax Regulation 1702(a)). 8/8/89.

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535.0800 **Withhold by Purchaser—No Transfer of Cash.** Corporation A holds a perfected security interest in Corporation B's inventory, equipment, receivables, and accounts to secure a promissory note and accounts receivable due from B to A. A is contemplating foreclosing on its security interest. A is also considering purchasing certain intangible property owned by B which is not encumbered by A's security interest. The consideration for the purchase of intangibles would be a credit or set off against B's indebtedness to A. If A acquires the intangible properties of B, it intends to operate B's business using the tangible personal property it expects to acquire through foreclosure. If A does not acquire the intangible property, it intends to resell the tangible personal property to an unrelated third party.

Even though A does not transfer any cash to B, A is liable for payment of B's unpaid sales tax if A completes the scenario as described above. The term ''withhold'' in section 6812 simply means dealing with purchase consideration in such a manner as to deny to the seller the benefit of the purchase consideration and to thereby make a portion of it available for satisfaction of the tax liability. (*Knudsen Dairy Co.* v. *State Board of Equalization* (1970) 12 Cal.App.3d 47, 55).

If, instead of the method discussed above, the tangible assets are actually acquired by a duly conducted foreclosure action, rather than a voluntary surrender or repossession, and A is the successful bidder at the foreclosure sale, this transaction would fall within the transfers pursuant to foreclosure of a mortgage exception to successor liability contained in Regulation 1702(a). Thus, A would not be liable for B's unpaid tax liability. 7/1/96.

SUMMER CAMPS

See Miscellaneous Service Enterprises.

SURPLUS PROPERTY

See United States, Sales by—"Surplus Property."